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In the Supreme Court of the United States

OCTOBER TERM, 1981

DONALD T. REGAN, SECRETARY OF THE TREASURY, ET AL., APPELLANTS

v.

TAXATION WITH REPRESENTATION OF WASHINGTON

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

JURISDICTIONAL STATEMENT

REX E. LEE
Solicitor General
GLENN L. ARCHER, JR.
Assistant Attorney General
STUART A. SMITH
Assistant to the Solicitor General
RICHARD FARRER
ROBERT S. POMERANCE
Attorneys
Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTION PRESENTED

Sections 170(c) and 501(c) of the Internal Revenue Code of 1954 grant to charitable and other organizations described in Section 501(c)(3) tax-exempt status and eligibility to receive tax-deductible contributions under Section 170(c)(2) on the condition that "no substantial part of the [organization's] activities * * * is carrying on propaganda, or otherwise attempting to influence legislation." The statute does not impose this restriction against influencing legislation on veterans' organizations qualifying for the same federal tax benefits under Sections 170(c)(3) and 501(c)(19).

The question presented is whether Congress' imposition of different standards with respect to the degree of permissible legislative activities by separate categories of tax-exempt organizations violates the equal protection guaranty of the Fifth Amendment.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statutes involved	3
Statement	3
The question is substantial	10
Conclusion	23
Appendix A	1a
Appendix B	11a
Appendix C	122a
Appendix D	123a

TABLE OF AUTHORITIES

Cases:

"Americans United" Inc. v. *Walters*, 477 F.2d 1169, rev'd on jurisdictional grounds *sub nom. Commissioner* v. *"Americans United" Inc.*, 416 U.S. 752	15
Bannerman v. *Department of Youth Authority*, 436 F. Supp. 1273	19-20
Bob Jones University v. *Simon*, 416 U.S. 725	5
Boone v. *Lightner*, 319 U.S. 561	19
Branch v. *DuBois*, 418 F. Supp. 1128	20
Buckley v. *Valeo*, 424 U.S. 1	15, 16, 20, 21
Cammarano v. *United States*, 358 U.S. 498	7, 11, 14, 15, 16
Carmichael v. *Southern Coal Co.*, 301 U.S. 495	20
Christian Echoes Ministry, Inc. v. *United States*, 470 F.2d 849, cert. denied, 414 U.S. 864	15
Feinerman v. *Jones*, 356 F. Supp. 252	20
Frederick v. *United States*, 707 F.2d 1264	19
Harris v. *McRae*, 448 U.S. 297	18

Cases—Continued Page

Haswell v. *United States*, 500 F.2d 1133, cert. denied, 419 U.S. 1107 ..... 15, 16
Jefferson v. *Hackney*, 406 U.S. 535 16
Johnson v. *Robison*, 415 U.S. 361 20
Katzenbach v. *Morgan*, 384 U.S. 641 ..... 16, 21
Koelfgen v. *Jackson*, 355 F. Supp. 243, aff'd mem., 410 U.S. 976 20
Lehnhausen v. *Lake Shore Auto Parts Co.*, 410 U.S. 356 14
LeMaistre v. *Leffers*, 333 U.S. 1 19
Madden v. *Kentucky*, 309 U.S. 83 14
Personnel Administrator of Massachusetts v. *Feeney*, 442 U.S. 256 19
Russell v. *Hodges*, 470 F.2d 212 19
San Antonio School District v. *Rodriguez*, 411 U.S. 1 ..... 13, 18
Simon v. *Eastern Ky. Welfare Rights Organization*, 426 U.S. 26 4
Slee v. *Commissioner*, 42 F.2d 184 16
Speiser v. *Randall*, 357 U.S. 513 15
Taxation With Representation v. *United States*, 76-2 U.S.T.C. ¶ 9693 (Sept. 28, 1976) 4
Taxation With Representation v. *United States*, 585 F.2d 1219, cert. denied, 441 U.S. 905 ....4, 7, 11, 15, 16, 19
Textile Mills Corp. v. *Commissioner*, 314 U.S. 326.. 14
Tigner v. *Texas*, 310 U.S. 141 23
United States v. *Christian Echoes Ministry, Inc.*, 404 U.S. 561 15
United States v. *Harriss*, 347 U.S. 612 16
United States v. *Maryland Savings-Share Insurance Corp.*, 400 U.S. 4 ..... 13, 20
Williamson v. *Lee Optical Co.*, 348 U.S. 483 16
United States R.R. Retirement Board v. *Fritz*, 449 U.S. 166 20

Constitution, statutes, and regulations:

United States Constitution:

First Amendment 4, 6, 7, 11, 12, 14, 20, 21
Fourth Amendment 13
Fifth Amendment 4, 6, 8, 12, 13, 21

Constitution, statutes, and regulations—Continued Page

Act of Aug. 29, 1972, Pub. L. No. 91-418, 86 Stat. 656:
Section 1 6
Section 2 18
Anti-Injunction Act, 26 U.S.C. 7421(a) 6
Federal Election Campaign Act of 1971, 2 U.S.C. 431 20
Internal Revenue Code of 1954 (26 U.S.C.):
Section 162(e) 14
Section 170(a) 3, 123a
Section 170(c) 3, 22, 123a
Section 170(c)(2) 3, 4, 5, 6, 12, 13, 14, 123a
Section 170(c)(2)(D) 17
Section 170(c)(3) 4, 6, 124a
Section 501(a) 3, 125a
Section 501(c) 3, 8, 9, 22
Section 501(c)(3) ..... *passim*
Section 501(c)(4) 4, 5, 6, 22, 127a
Section 501(c)(7) 6, 127a
Section 501(c)(19) 6, 8, 9, 11, 13, 18, 19, 22, 137a
Section 501(h) 18
Section 507-509 18
Section 2055(a) 3, 141a
Section 2055(a)(2) 5, 13, 142a
Section 2522(a) 3, 143a
Section 2522(a)(2) 5, 13
Section 4911 18
Section 4945 18
Section 7428 5
Revenue Act of 1924, ch. 234, Section 214(a)(10)(D), 43 Stat. 269 6
Revenue Act of 1934, ch. 277, 48 Stat. 680 *et seq.*:
Section 23(o)(2), 48 Stat. 690 ..... 12, 17
Section 23(o)(3), 48 Stat. 690 17
Section 23(o)(4), 48 Stat. 690 ..... 17, 19
Section 101(6), 48 Stat. 700 ..... 12, 17
Section 406, 48 Stat. 755 13
Section 517, 48 Stat. 760 13

Constitution, statutes, and regulations—Continued Page

Revenue Act of 1962, Pub. L. No. 87-834, Section 3(a), 76 Stat. 973 14
Tax Reform Act of 1969, Pub. L. No. 91-172, 83 Stat. 492-496, 512 18
Tax Reform Act of 1976, Pub. L. No. 94-455, 90 Stat. 1720, 1723 18
36 U.S.C. 46 22
36 U.S.C. 67d 22
36 U.S.C. 90f 22
Treasury Regulations 45, Art. 517, T.D. 2831, 21 Treas. Dec. Int. Rev. 285 (1919) 13
Treasury Regulations on Income Tax (1954 Code) (26 C.F.R.):
Section 1.501(c)(4)-1(a)(2)(ii) 4
Section 1.501(c)(19)-1(c) 21

Miscellaneous:

78 Cong. Rec. (1934):
p. 5861 ..... 11, 17
p. 5959 17
p. 7831 17
2 Cum. Bull. 152 (1920) 13
Hearings on Legislative Activity by Certain Types of Exempt Organizations Before the House Comm. on Ways and Means, 92d Cong., 2d Sess. (1972) 18
H.R. Conf. Rep. No. 1385, 73d Cong., 2d Sess. (1934) 17
H.R. Rep. No. 92-851, 92d Cong., 2d Sess. (1972) .. 6
H.R. Rep. No. 91-413 (Pt. 1), 91st Cong., 1st Sess. (1969) 18
Rev. Rul. 55-156, 1955-1 Cum. Bull. 292 19
S. Rep. No. 91-552, 91st Cong., 1st Sess. (1969) .. 18
S. Rep. No. 92-1082, 92d Cong., 2d Sess. (1972) .. 6

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JURISDICTIONAL STATEMENT

OPINIONS BELOW

The opinion of the district court (App. A, *infra*, 1a-9a)and its order granting judgment in favor of the government (App. A, *infra*, 10a) is unofficially reported at 43 A.F.T.R.2d 79-679. The opinion of the court of appeals en banc (App. B, *infra*, 11a-121a) is reported at 676 F.2d 715.

JURISDICTION

This is a civil action against the Secretary of the Treasury, the Commissioner of Internal Revenue, and the United States, brought by appellee pursuant to Section 7428 of the Internal Revenue Code of 1954 (26 U.S.C.), for a declaratory judgment with respect

to appellee's qualification for tax-exempt status under Section 501(c)(3) of the Code. The district court's jurisdiction rested on 28 U.S.C. 1346(e). A three-judge panel of the court of appeals entered an opinion and judgment on April 14, 1981 (App. B, *infra*, 15a). On June 11, 1981, the court of appeals granted appellee's suggestion for rehearing en banc and vacated the panel's opinion and judgment (*ibid.*). The judgment of the court of appeals en banc was filed on March 26, 1982 (App. B, *infra*, 11a). A notice of appeal to this Court was filed by the appellants on April 23, 1982 (App. C, *infra*, 122a). The jurisdiction of this Court rests on 28 U.S.C. 1252, which authorizes an appeal to this Court from a final judgment of a court of the United States holding an Act of Congress unconstitutional in a civil action to which the United States or any agency or officer thereof is a party. An appeal may be taken where, as here, a federal statute is held unconstitutional as applied to particular circumstances. *United States* v. *Darusmont*, 449 U.S. 292, 293 (1981); *Fleming* v. *Rhodes*, 331 U.S. 100 (1947); see *United States* v. *Christian Echoes Ministry, Inc.*, 404 U.S. 561, 563 (1972); *United States* v. *American Friends Service Committee*, 419 U.S. 7, 9, n.4 (1974).[1]

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[1] Although the court of appeals held that the combination of Sections 170(c)(2) and 501(c)(3), on the one hand, and Sections 170(c)(3) and 501(c)(19), on the other, violated the equal protection guaranty of the Fifth Amendment, it did not specify which statutory provisions must yield. Rather, it left the question of remedy to the district court (see pages 9-10, *infra*). As set forth above in our discussion of jurisdiction, we believe that the court has held unconstitutional a statute as applied to particular circumstances. If the Court concludes that the proper mode of review is by certiorari, this filing should be treated as a petition for a writ of certiorari under 28 U.S.C. 2103.

STATUTES INVOLVED

The relevant provisions of Sections 170(a), 170 (c), 501(a), 501(c), 2055(a), and 2522(a) of the Internal Revenue Code of 1954 (26 U.S.C.) are set forth in App. D, *infra* 123a-144a.

STATEMENT

The material facts are undisputed and may be summarized as follows: Appellee is a nonprofit organization incorporated under the laws of the District of Columbia (A. 24).[2] As set forth in its application to the Internal Revenue Service for recognition as a tax-exempt organization, its purpose is to represent the general public, with regard to federal tax matters in the courts, at administrative hearings, and before Congress (App. A, *infra*, 1a-2a; App. B, *infra*, 13a; A. 26, 33). Appellee is the product of a merger between two other nonprofit corporations under common control—Taxation With Representation Fund (TWR Fund), and Taxation With Representation (TWR) (App. A, *infra*, 2a; App. B, *infra*, 13a n.1; A. 14, 16). Prior to the merger, TWR Fund, which published the journal *Tax Notes* and was devoted to courtroom advocacy, had qualified as a tax-exempt charitable and educational organization under Section 501(c)(3) of the Code eligible to receive tax-deductible contributions under Section 170(c)(2) of the Internal Revenue Code of 1954 (26 U.S.C.) (App. A, *infra*, 2a; A. 16, 21, 52). TWR, which engaged primarily in legislative activities, in-

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[2] "A" refers to the separately bound record appendix filed in the court of appeals.

cluding attempts to influence legislation, had received recognition as a tax-exempt social welfare organization under Section 501(c)(4) of the Code. (App. A, *infra*, 2a-3a; App. B, *infra*, 13a, n.1; 16a, 19a, 20a.)[3]

During the pendency of TWR's unsuccessful prior attempt to challenge the constitutionality of the

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[3] A Section 501(c)(4) social welfare organization may engage in substantial lobbying in furtherance of its exempt purpose. Unlike a Section 501(c)(3) organization, a social welfare organization is not eligible to receive tax-deductible contributions or exemption from federal unemployment or social security taxes. See *Simon* v. *Eastern Ky. Welfare Rights Organization*, 426 U.S. 26, 29, n.1 (1976); Treasury Regulations on Income Tax (1954 Code), Section 1.501(c)(4)-1(a)(2)(ii) (26 C.F.R.). Prior to the merger, the IRS had denied recognition to TWR as a Section 501(c)(3) organization because it could not meet the requirement of that provision that "no substantial part" of its activities consist of "attempting to influence legislation." Seeking to establish that it qualified as a Section 501(c)(3) organization, TWR then sued in the United States District Court for the Eastern District of Virginia for a refund of federal unemployment taxes assessed for 1973 through 1975. It alleged in that proceeding that the lobbying limitation of Section 501(c)(3) violated its rights under the First and Fifth Amendments to the Constitution. The district court upheld the constitutionality of the statute and entered judgment for the government. *Taxation With Representation* v. *United States*, 76-2 U.S.T.C., ¶ 9693 (1976) (E.D. Va.). The court of appeals affirmed (585 F.2d 1219 (4th Cir. 1978)), and this Court denied certiorari (441 U.S. 905 (1979)). The court of appeals held that TWR's right to free speech and to petition Congress were not impaired by the lobbying restrictions of Section 501(c)(3) and 170(c)(2). Further, the court rejected TWR's argument that it was denied equal protection because Section 170(c)(3) permits veterans' organizations to lobby and still be eligible to receive tax-deductible contributions (585 F.2d at 1223-1224).

lobbying restrictions applicable to tax-exempt organizations under Section 501(c)(3) (see note 3, *supra*), appellee was formed in 1977 to absorb and carry forward the activities of TWR Fund and TWR, including TWR's lobbying activities (App. A, *infra*, 2a; App. B, *infra*, 13a, n.1; A. 16). Shortly after its incorporation, appellee applied to the Internal Revenue Service for recognition as a tax-exempt organization described in Section 501(c)(3) (App. A, *infra*, 3a; App. B, *infra*, 13a-14a; A. 32 *et seq.*). On February 14, 1978, the Service ruled that appellee did not qualify for exemption under Section 501(c)(3) and was therefore not eligible to receive tax-deductible contributions under Section 170(c)(2). The basis of the Service's determination was its finding that appellee's stated purpose included attempting to influence legislation, and that legislative advocacy might constitute a substantial part of its activities (App. A, *infra*, 3a; App. B, *infra*, 15a; A. 48). Although it appears that appellee may still qualify as a tax-exempt social welfare organization under Section 501(c)(4), that classification, as we have noted (see note 3, *supra*), would not entitle appellee to receive tax-deductible contributions. See 26 U.S.C. 170(c)(2), 2055(a)(2), 2522(a)(2).

After exhausting its administrative remedies, appellee instituted this suit in the United States District Court for the District of Columbia under Section 7428 of the Code[4] seeking a declaratory judg-

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[4] Section 7428 of the Code authorizes declaratory judgment actions in the Tax Court, the Court of Claims, and the United States District Court for the District of Columbia in cases relating to the status and classification of organizations under Section 501(c)(3). The statute was enacted in response to this Court's decision in *Bob Jones University* v. *Simon*, 416 U.S. 725 (1974), holding that actions to enjoin

ment that it qualifies as an organization described in Section 501(c)(3). It raised two constitutional challenges to the lobbying restrictions of Sections 501(c)(3) and 170(c)(2). It first contended that withholding eligibility to receive tax-deductible contributions on the ground that it engaged in substantial lobbying activity imposed an unconstitutional condition on the exercise of its First Amendment rights of freedom of speech and association. Second, it claimed that Congress' failure to apply the same lobbying restrictions in Section 501(c)(3) to certain other tax-exempt groups eligible to receive tax-deductible contributions, most notably veterans' organizations, denied it equal protection of the laws under the Fifth Amendment (A. 5-6).[5]

The district court granted summary judgment in favor of the government (App. A, *infra*, 1a-10a). It concluded that the tax statutes did not unconstitutionally interfere with appellee's protected speech ac-

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the Commissioner's revocation of Section 501(c)(3) status were barred by the Anti-Injunction Act, 26 U.S.C. 7421(a).

[5] Veterans' organizations are eligible for tax-exempt status and the receipt of tax-deductible contributions under Sections 501(c)(19) and 170(c)(3) of the Code. Unlike Sections 501(c)(3) and 170(c)(2), the tax provisions governing veterans' organizations contain no express restrictions as to lobbying. Prior to the enactment of Section 501(c)(19) (by Section 1, Act of Aug. 29, 1972, Pub. L. No. 92-418, 86 Stat. 656) veterans' organizations received exemption either as social welfare organizations (Section 501(c)(4)) or social clubs (Section 501(c)(7)). See H.R. Rep. No. 92-851, 92d Cong., 2d Sess. 2 (1972); S. Rep. No. 92-1082, 92d Cong., 2d Sess. 2 (1972). Veterans' groups, however, have been entitled, under Section 170(c)(3) and its predecessors, to receive tax-deductible contributions at least since 1924. See Section 214(a)(10)(D), Revenue Act of 1924, ch. 234, 43 Stat. 269.

tivities. Relying on *Cammarano* v. *United States*, 358 U.S. 498 (1959), and the Fourth Circuit's decision rejecting the same claim in *Taxation With Representation* v. *United States*, 585 F.2d 1219 (1978), cert. denied, 441 U.S. 905 (1979), the district court concluded that the restriction against substantial legislative activity provided in Section 501(c)(3) did not penalize appellee for the content of its advocacy, but merely required that it conduct its legislative activities at its own, rather than at public, expense. This requirement, the court observed, served the legitimate purpose of assuring government neutrality toward the lobbying activities of charitable organizations and of preventing abuse of charitable lobbying by private interests (App. A, *infra*, 5a-7a). Further, the court found no denial of equal protection. In its view, since the challenged tax classification neither implicated a fundamental right or involved a suspect class, it was sufficient that the classification bore a rational relation to legitimate government objectives (*id.* at 8a).

A divided panel of the court of appeals affirmed. Thereafter, the full court of appeals vacated the panel decision and reheard the case en banc. Upon rehearing, a divided en banc court (7-3) reversed the district court and remanded the case for further proceedings. The court unanimously rejected appellee's contention that the lobbying limitation of Section 501(c)(3) violates its First Amendment rights. On the authority of this Court's decision in *Cammarano* v. *United States*, *supra*, it observed that "First Amendment rights are not abridged merely because the government refuses to subsidize those rights" (App. B, *infra*, 30a). As it viewed the lobbying limitations of Section 501(c)(3), "[c]haritable organizations are simply not required to waive their

Although the court held that "Section 501(c)'s disparate treatment of lobbying by particular tax-exempt groups leads to an unconstitutional violation of equal protection principles" (*id.* at 72a), it declined to choose between striking down the lobbying restriction's application to Section 501(c)(3) organizations, or extending the restriction to Section 501(c)(19) veterans' organizations. As the court noted, the former course "poses the most obvious problems" insofar as "[t]he legislative history of that limitation clearly shows a congressional determination that the public interest requires regulating the amount of tax-deductible dollars flowing to Section 501(c)(3) organizations that may be used for lobbying purposes" (App. B, *infra*, 73a). The court acknowledged that "Extending the lobbying treatment now given to veterans' organizations to all Section 501(c)(3) organizations might open a Pandora's Box of woes and abuse" (*ibid.*). On the other hand, even though it believed the second course to be "the most logical and in accordance with the judgments expressed by Congress" (*id.* at 76a), the court was reluctant to impose limitations upon veterans' groups because none of those groups are party to the litigation (*id.* at 76a). It accordingly declined to prescribe a remedy. In its view, "[e]xactly how this problem should be cured is not a matter that should be decided initially by this appellate court, especially when all directly affected parties are not before us" (*id.* at 78a).

The court therefore remanded the case to the district court "with the instruction that it cure the constitutionally invalid operation of Section 501(c) after inviting veterans' organizations to participate in framing the relief" (*id.* at 77a). The court, however, limited the district court to choosing between two courses of action to cure the unequal treatment

it found to exist—"either by restricting the tax benefits accorded veterans' organizations or by extending those benefits to Section 501(c)(3) organizations" (*id.* at 79a).

The dissenting judges would have held that it was within the power of Congress to place an anti-lobbying condition on the receipt of tax benefits by Section 501(c)(3) organizations without imposing a similar condition on veterans' organizations (App. B, *infra*, 107a-120a). In their view, Congress was justified in subjecting Section 501(c)(3) organizations to that restriction in order to reform perceived abuses of their status (*id.* at 95a-99a). Congress was likewise justified, the dissent said, in its determination not to extend that restriction to veterans' organizations because of their fundamentally different role in society (*id.* at 115a). In the dissent's view, "the important and unique public role played by veterans' groups" warranted congressional classification "as a different kind of entity deserving tax treatment different from that accorded the more generally described organizations subject to section 501(c)(3)" (*id.* at 115a-116a).

THE QUESTION IS SUBSTANTIAL

The court of appeals has erroneously held unconstitutional, on equal protection grounds, provisions of the Internal Revenue Code governing the tax-exempt status and eligibility for tax-deductible contributions of a broad range of organizations.

Under this statutory system, which has been in continuous force for almost 50 years, Congress has expressed "a sharply defined national policy" against the allowance of tax deductions for contributions to organizations, otherwise qualified under Section 501(c)(3) of the Code, which engage in substantial

activities to influence legislation. *Cammarano* v. *United States*, 358 U.S. 498, 508 (1959). This condition upon qualification for tax-exempt status and eligibility for tax deductible contributions, designed to prevent the use of tax-exempt or tax-deductible funds "to advance the personal interests of the giver * * *" (78 Cong. Rec. 5861 (1934)), was upheld by a unanimous Court in *Cammarano* as consistent with the First Amendment's guaranty of free speech (358 U.S. at 512-513).

Here, the court of appeals ruled that the absence of a similar restriction against lobbying by tax-exempt veterans' groups under Section 501(c)(19) "leads to an unconstitutional violation of equal protection principles" (App. B, *infra*, 72a). Faced with the choice of eliminating the lobbying restriction for all Section 501(c)(3) organizations, as appellee urges, or imposing it upon veterans' organizations, which the court believed to be "the most logical" course (App. B, *infra*, 76a), the court remanded the case to the district court to rewrite the statute under either of these alternatives, after inviting veterans' groups to participate in framing the relief.

Such an extraordinary disposition calls for review by this Court. The court of appeals' imposition of the duties and responsibilities of a legislative committee upon a federal district court cannot be reconciled with the separation of powers among the three branches of government that is at the heart of our constitutional system. Moreover, the decision below squarely conflicts with that of the Fourth Circuit in *Taxation With Representation* v. *United States*, 585 F.2d 1219 (1978), cert. denied, 441 U.S. 905 (1979), which rejected an identical equal protection challenge to Section 501(c)(3), by an organizational predeces-

sor of appellee. This Court should note probable jurisdiction in order to resolve the important constitutional question presented and to eliminate the cloud of uncertainty which the decision below has cast over the exempt organization provisions of the Internal Revenue Code.

1. Although the court of appeals unanimously rejected appellee's contention that the lobbying limitation violates its rights under the First Amendment, the majority concluded that appellee's equal protection claim was subject to strict judicial scrutiny. This determination regarding the appropriate standard of review was a critical factor in the court's ultimate decision that the lobbying limitation violates appellee's equal protection rights under the Fifth Amendment. Accordingly, we proceed at the outset to show that the lobbying limitation does not infringe appellee's First Amendment rights or otherwise involve an invidious classification which would make strict judicial scrutiny appropriate. We then show that the challenged tax classification must be sustained since it is rationally related to the achievement of a legitimate governmental purpose.

a. In 1934, Congress amended the revenue laws for the specific purpose of denying tax-exempt status and deductibility of contributions to corporations, otherwise qualifying as "religious, charitable * * * or educational," which engage in activities designed to promote or defeat legislation. Revenue Act of 1934, ch. 277, Sections 101(6) and 23(o)(2), 48 Stat. 700, 690. Carried forward unchanged into the 1939 Internal Revenue Code, and now contained in Sections 501(c)(3) and 170(c)(2) of the Internal Revenue Code of 1954, this limitation makes any organization otherwise qualified ineligible for exemp-

tion under Section 501(c)(3) and ineligible under Section 170(c)(2) to receive tax-deductible contributions where "a substantial part of the activities of * * * [such organization] is carrying on propaganda, or otherwise attempting, to influence legislation * * *."[7] It thus confirmed a consistent administrative practice traceable to Treasury Rulings and Regulations promulgated under the Revenue Act of 1918.[8]

The decision below—holding unconstitutional the statutory system that imposes a lobbying limitation upon Section 501(c)(3) organizations but not upon Section 501(c)(19) veterans' organizations—has no support in the decisions of this Court construing the equal protection guarantees of the Fifth and Fourteenth Amendments. This Court has made clear that legislatures possess the widest latitude to draw distinctions between various types of organizations in the area of taxation, and that a tax classification rationally related to the achievement of a legitimate governmental purpose will not be set aside unless it is invidious or unjustifiably infringes upon a fundamental right. *United States* v. *Maryland Savings-Share Insurance Corp.*, 400 U.S. 4 (1970); *San Antonio School District* v. *Rodriguez*, 411 U.S. 1, 17, 40-

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[7] Section 170(c)(2) governs the deductibility for income tax purposes of contributions to charitable organizations. Corresponding provisions added in 1934, now contained in Sections 2055(a)(2) and 2522(a)(2) of the 1954 Code, respectively deny deductions for estate and gift tax purposes for gifts to organizations "disqualified for tax exemption under section 501(c)(3) by reason of attempting to influence legislation * * *." See Revenue Act of 1934, ch. 277, Sections 406, 517, 48 Stat. 755, 760.

[8] See Treasury Regulations 45, Art. 517, T.D. 2831, 21 Treas. Dec. Int. Rev. 285 (1919); S. 1362, 2 Cum. Bull. 152, 154 (1920).

41 (1973); *Madden* v. *Kentucky*, 309 U.S. 83, 87-88 (1940); *Lehnhausen* v. *Lake Shore Auto Parts Co.*, 410 U.S. 356 (1973).

There is, however, no invidious discrimination in this case. Nor does the lobbying limitation substantially infringe any right protected by the Constitution. This is the teaching of *Cammarano* v. *United States*, 358 U.S. 498 (1959). There, this Court addressed longstanding Treasury Regulations, previously sustained as consistent with congressional intent (*Textile Mills Corp.* v. *Commissioner*, 314 U.S. 326, 335-336 (1941)), which expressed the same "national policy" as the lobbying limitations now found in Sections 501(c)(3) and 170(c)(2) of the Internal Revenue Code of 1954. Those Regulations denied a deduction for business expenses, otherwise qualifying as "ordinary and necessary," if incurred for "lobbying purposes" or for "the promotion or defeat of legislation * * * ." Cf. Internal Revenue Code of 1954, Section 162(e), as amended by Section 3(a)), Revenue Act of 1962, Pub. L. No. 87-834, 76 Stat. 973. This Court unanimously rejected the argument that denial of deductions for such expenses presented a substantial constitutional issue under the First Amendment. As the Court explained, "[p]etitioners are not being denied a tax deduction because they engage in constitutionally protected activities, but are simply being required to pay for those activities entirely out of their own pockets, as everyone else engaging in similar activities is required to do under the provisions of the Internal Revenue Code" (358 U.S. at 513). In accordance with *Cammarano*, the lower courts have uniformly held the lobbying limitation of Section 501(c)(3) impairs no right protected by the First Amendment.

Taxation With Representation v. *United States*, 585 F.2d 1219, 1223-1224 (4th Cir. 1978), cert. denied, 441 U.S. 905 (1979); *Christian Echoes Ministry, Inc.* v. *United States*, 470 F.2d 849, 856-857 (10th Cir.), cert. denied, 414 U.S. 864 (1973); *Haswell* v. *United States*, 500 F.2d 1133, 1147-1149 (Ct. Cl. 1974), cert. denied, 419 U.S. 1107 (1975); see *"Americans United" Inc.* v. *Walters*, 477 F.2d 1169, 1181-1182 (D.C. Cir. 1973), rev'd on jurisdictional grounds *sub nom. Commissioner* v. *"Americans United" Inc.*, 416 U.S. 752 (1974).

b. The court of appeals acknowledged the force of this precedent. As it observed, "[c]haritable organizations are simply not required to waive their First Amendment rights in order to obtain public benefits—they simply may not lobby with tax-deductible contributions" (App. B, *infra*, 34a). See *Cammarano* v. *United States*, *supra*, 358 U.S. at 515 (Douglas, J., concurring); cf. *Buckley* v. *Valeo*, 424 U.S. 1, 93-95 (1976). It went on to conclude, however, that *Cammarano* and *Speiser* v. *Randall*, 357 U.S. 513, 519 (1958), together require "a strict standard of review for situations in which the government grants tax exemptions affecting First Amendment rights on a discriminatory basis" (App. B, *infra*, 38a).

But the lobbying limitation imposed upon appellee bears no resemblance to the loyalty oath requirement that the Court struck down in *Speiser*. Unlike the loyalty oath that was a condition of property tax exemption, Section 501(c)(3) is "plainly not 'aimed at the suppression of dangerous ideas.'" *Cammarano* v. *United States*, *supra*, 358 U.S. at 513, quoting *Speiser* v. *Randall*, *supra*, 357 U.S. at 519. As the district court here pointed out, the lobbying limitation serves the legitimate government purpose of assuring the Treasury's neutrality toward the lobbying ac-

tivities of charitable organizations, of preventing abuses of charitable lobbying by private interests, and of preserving a balance between the lobbying activities of charitable organizations and those of other organizations and individuals (App. A, *infra*, 7a). Cf. *United States* v. *Harriss*, 347 U.S. 612, 625-626 (1954). The limitation upon lobbying activities is neutral as to the points of view appellee would espouse. It therefore does not suffer the constitutional infirmity of the loyalty oath in *Speiser*. *Cammarano* v. *United States*, *supra*, at 512-513; see *Taxation with Representation* v. *United States*, *supra*; *Haswell* v. *United States*, 500 F.2d 1133, 1142, 1150 (Ct. Cl. 1974), cert. denied, 419 U.S. 1107 (1975). As Judge Learned Hand concluded with respect to a similar restriction against the deduction of lobbying expenses, "[p]olitical agitation as such is outside the statute, however innocent the aim * * *. Controversies of that sort must be conducted without public subvention; the Treasury stands aside from them." *Slee* v. *Commissioner*, 42 F.2d 184, 185 (2d Cir. 1930).

c. Moreover, it is well-settled that a statutory classification is not deemed invidious merely because it addresses " 'the phase of the problem which seems most acute to the legislative mind.' " *Buckley* v. *Valeo*, 424 U.S. 1, 105 (1976), quoting *Williamson* v. *Lee Optical Co.*, 348 U.S. 483, 489 (1955). See *Katzenbach* v. *Morgan*, 384 U.S. 641, 647 (1966); *Jefferson* v. *Hackney*, 406 U.S. 535, 546 (1972). The lobbying limitation is precisely such a remedial measure. According to the floor debate surrounding its enactment, "the attention of the Senate [Finance] committee was called to the fact that there [were] certain organizations * * * receiving contributions in

order to influence legislation and carry on propaganda." 78 Cong. Rec. 5959 (1934) (Sen. Harrison).[9] Although the chairman of that committee made clear his view that the limitation should be inserted elsewhere in the bill to apply to all organizations, including "war organizations," otherwise eligible for tax-deductible contributions, Congress, having his view before it, enacted, and has since maintained in continuous effect, a limitation applicable by its terms only to organizations classified as charitable and not to veterans' organizations.[10] See Revenue Act of 1934, *supra*, Sections 23(o)(2) and 101(6); Internal Revenue Code of 1954, 26 U.S.C. 170(c)(2)(D), 501(c)(3).

Finally, in 1969, and again as recently as 1976, after extensive debate, Congress reaffirmed the vitality of

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[9] See *id.* at 5861: "There is no reason in the world why a contribution * * * should be deductible if it is a selfish one made to advance the personal interests of the giver of the money. That is what the committee was trying to reach * * *."

[10] See 78 Cong. Rec. 5959 (1934) (remarks of Sen. Harrison). The Revenue Act of 1934, ch. 277, 48 Stat. 690, recognized five categories of organizations as eligible donees of tax-deductible contributions, including charitable organizations (Section 23(o)(2)), "the special fund for vocational rehabilitation authorized by * * * the World War Veterans' Act, 1924" (Section 23(o)(3)), and posts or organizations of war veterans (Section 23(o)(4)). The Senate amendment, to Section 23(o)(2), would have prohibited any deduction for contributions made to charitable organizations, "a substantial part of the activities of which is participation in partisan politics or is carrying on propaganda, or otherwise attempting, to influence legislation." The House conferees secured a concession striking out the reference to "participation in partisan politics" because of their concern that the Senate amendment was "too broad." 78 Cong. Rec. 7831 (1934); H.R. Conf. Rep. No. 1385, 73d Cong., 2d Sess. 17, 19 (1934).

that limitation as a necessary curb upon the flow of tax-exempt and tax-deductible funds to charitable organizations active in political and legislative matters. 26 U.S.C. Sections 507-509, 4945 (added by the Tax Reform Act of 1969, Pub. L. No. 91-172, 83 Stats. 492-496, 512); 26 U.S.C. 501(h), 4911 (added by Tax Reform Act of 1976, Pub. L. No. 94-455, 90 Stats. 1720, 1723). See H.R. Rep. No. 91-413 (Pt. 1), 91st Cong., 1st Sess. 31-35; 46-51 (1969); S. Rep. No. 91-552, 91st Cong., 1st Sess. (1969); *Hearings on Legislative Activity by Certain Types of Exempt Organizations Before the House Comm. on Ways and Means*, 92d Cong., 2d Sess. (1972). As it did so, Congress turned its attention specifically to the tax treatment of veterans' organizations and continued in effect their longstanding exemption from the lobbying limitation imposed on other tax-exempt organizations. See 26 U.S.C. 501(c)(19), added by Section 2, Act of Aug. 29, 1972, Pub. L. No. 91-418, 86 Stat. 656.

This disparity in treatment of two different classes of organizations is not (and appellee has never contended otherwise) based on any "suspect" criterion. Consequently, the statutory classification challenged by appellee is not subject to strict judicial scrutiny, as the court below erroneously held, but rather merely must "be examined to determine whether it rationally furthers some legitimate, articulated state purpose and therefore does not constitute an invidious discrimination." *San Antonio School District* v. *Rodriguez*, *supra*, 411 U.S. at 17; see *Maher* v. *Roe*, 432 U.S. 464, 470 (1977); *Harris* v. *McRae*, 448 U.S. 297, 322 (1980).

3. In light of the foregoing considerations, we submit that the proper inquiry in this case is whether the classifications of Section 501(c) rest on a rational basis, and that the statute meets that constitutional

standard. As the Fourth Circuit correctly pointed out in *Taxation With Representation* v. *United States*, *supra*, 585 F.2d 1219, 1224 (1978), cert. denied, 441 U.S. 905 (1979), in rejecting an identical equal protection claim by an organizational predecessor of appellee, "[t]he unique and compelling societal and governmental goals served by * * * [veterans'] organizations provide ample justification for the special tax treatment extended to them by the Congress." See also App. B, *infra*, 115a-116a (dissenting opinion). Veterans' organizations are composed principally of war veterans to whom the nation owes special gratitude for enduring the peril and disruption of civil pursuits associated with wartime service in the Armed Forces.[11] Both Congress and state legislatures have recognized that debt by establishing veterans' preferences and other statutory benefits "to protect those who have been obliged to drop their own affairs to take up the burdens of the nation." *Boone* v. *Lightner*, 319 U.S. 561, 575 (1943). Accord: *LeMaistre* v. *Leffers*, 333 U.S. 1, 6 (1948). The legislative authority to provide such special benefits for veterans has been sustained repeatedly against constitutional attack.[12] It follows

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[11] To qualify for exemption under Section 501(c)(19), at least 75% of a veterans' organization's members must be war veterans and substantially all of the other members must be veterans or the spouses or widows of veterans. See Rev. Rul. 55-156, 1955-1 Cum. Bull. 292 (no deductions under Section 23(o)(4) of the 1939 Code for contributions to reserve officers' association not composed principally of war veterans).

[12] See *Personnel Administrator of Massachusetts* v. *Feeney*, 442 U.S. 256 (1979); *Russell* v. *Hodges*, 470 F.2d 212 (2d Cir. 1972) (Friendly, J.); *Frederick* v. *United States*, 507 F.2d 1264 (Ct. Cl. 1974); *Bannerman* v. *Department of*

that Congress, in the exercise of its broad power to "singl[e] out • • • one particular class for taxation or exemption" (*Carmichael* v. *Southern Coal Co.*, 301 U.S. 495, 509 (1937)), has similar authority to protect the interests of veterans by allowing their organizations to use tax-deductible contributions for lobbying on matters of importance to veterans without allowing other types of organizations to lobby with tax-deductible funds.[13]

In this respect, the statute is analogous to the provisions of the Federal Election Campaign Act of 1971, 2 U.S.C. 431 *et seq.* (1976), that the Court upheld in *Buckley* v. *Valeo*, 424 U.S. 1, 93-108 (1976). There, the Court rejected a First Amendment and equal protection challenge to the provision of the Act providing public funding of primary election campaigns, which allowed no funds to candidates who

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Youth Authority, 436 F. Supp. 1273 (N.D. Cal. 1977); *Branch* v. *DuBois*, 418 F. Supp. 1128 (N.D. Ill. 1976); *Feinerman* v. *Jones*, 356 F. Supp. 252 (M.D. Pa. 1973) (three-judge court); *Koelfgen* v. *Jackson*, 355 F. Supp. 243 (D. Minn. 1972) (three-judge court), aff'd mem., 410 U.S. 976 (1973); cf. *Johnson* v. *Robison*, 415 U.S. 361, 378-383 (1974).

[13] Contrary to the court of appeals' suggestion (App. B, *infra*, 49a-50a & 65a n.44), the inquiry as to the governmental interests served by special treatment of veterans' organizations in the Internal Revenue Code need not be confined to the expressed legislative history of the statutes. As this Court recently stated in *United States R.R. Retirement Board* v. *Fritz*, 449 U.S. 166, 179 (1980), "[w]here • • • there are plausible reasons for Congress' action our inquiry is at an end. It is, of course, 'constitutionally irrelevant whether this reasoning in fact underlay the legislative decision,' • • • because this Court has never insisted that a legislative body articulate its reasons for enacting a statute." See also *United States* v. *Maryland Savings-Share Insurance Corp.*, 400 U.S. 4 (1970).

did not run in primary elections. Just as Congress could determine to limit public funding to a particular class of candidates without running afoul of the First and Fifth Amendments, Congress can likewise here determine that veterans' organizations can be eligible for tax exempt status and tax deductible contributions without regard to the lobbying restrictions imposed upon other types of tax-exempt organizations. Put another way, it is entirely open to Congress to foreclose lobbying activities by charitable and educational organizations at public expense without making a similar determination with respect to veterans' organizations. As the Court stated in *Buckley* v. *Valeo*, *supra*, 424 U.S. at 105, quoting *Katzenbach* v. *Morgan*, *supra*, 384 U.S. at 647:

> [I]n deciding the constitutional propriety of the limitations in such a reform measure we are guided by the familiar principles that a 'statute is not invalid under the Constitution because it might have gone farther than it did,' *Rochen* v. *Ward*, 279 U.S. 337, 339, that a legislature need not 'strike at all evils at the same time,' *Semler* v. *Dental Examiners*, 294 U.S. 608, 610, and that 'reform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind,' *Williamson* v. *Lee Optical* Co., 348 U.S. 483, 489.

See also 424 U.S. at 105 n.143.

Furthermore, Congress has not in fact given veterans' organizations carte blanche authority to lobby with tax-deductible contributions. As the dissenting opinion below points out (App. B, *infra*, 116a-117a), the federal statutes governing the American Legion and AMVETS, among other prominent veterans' groups chartered by Congress, contain provisions barring them from engaging in partisan

political activity and otherwise limiting their political and legislative involvements. *E.g.*, 36 U.S.C. 46 (American Legion), 67d (AMVETS), 90f (Disabled American Veterans). Congress has thereby taken steps to ensure that the lobbying of veterans' organizations is directed toward the purposes for which those organizations were chartered. Cf. Treasury Regulations on Income Tax (1954 Code) (26 C.F.R.), Section 1.501(c)(19)-1(c), requiring that veterans' organizations be operated exclusively for one or more enumerated exempt purposes in order to qualify for exemption under Section 501(c)(19) of the Internal Revenue Code. Thus, if a veterans' organization were to engage in substantial lobbying activities with respect to matters unrelated to its exempt purpose, it would be subject to loss of its exempt status under Section 501(c)(19).

4. At all events, the constitutionality of Sections 501(c) and 170(c) is an important question that should be decided by this Court. The potential impact of the decision below is confirmed by the court's recital of the numbers of charitable and veterans' organizations recognized as tax-exempt and the aggregate amounts of deductible contributions to them (App. B, *infra*, 23a-27a).[14] As the court observed (*ibid.*), an extension to Section 501(c)(3) organizations of the right now given to veterans' organizations to lobby with tax-deductible contributions would invite wholesale public subvention of partisan interests in derogation of the legitimate and clearly ex-

[14] The Internal Revenue Service advises that as of the close of 1981, approximately 300,000 organizations were recognized as exempt under Section 501(c)(3), and approximately 35,000 veterans' groups were listed as exempt under Sections 501(c)(4) and 501(c)(19).

pressed expectations of Congress. The alternative suggested course of eliminating the ability of veterans' organizations to participate in legislative activities would likewise thwart the will of Congress. Equal protection does not require that "things which are different in fact * * * to be treated in law as though they were the same." *Tigner* v. *Texas*, 310 U.S. 141, 147 (1940). Hence, the equal protection clause does not demand that distinct categories of tax-exempt organizations be accorded identical treatment.

CONCLUSION

Probable jurisdiction should be noted.

Respectfully submitted.

REX E. LEE
Solicitor General

GLENN L. ARCHER, JR.
Assistant Attorney General

STUART A. SMITH
Assistant to the Solicitor General

RICHARD FARBER
ROBERT S. POMERANCE
Attorneys

JUNE 1982

APPENDIX A

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Civil Action No. 78-834

TAXATION WITH REPRESENTATION OF WASHINGTON, PLAINTIFF

vs.

W. MICHAEL BLUMENTHAL, ET AL., DEFENDANTS

[Filed Jan. 31, 1979]

MEMORANDUM OPINION

Plaintiff Taxation with Representation of Washington (TWRW) has brought this action against W. Michael Blumenthal, the Secretary of the Treasury, Jerome Kurtz, Commissioner of the Internal Revenue, and the United States of America for a declaratory judgment under 26 U.S.C. § 7428 to overturn a final denial by the Internal Revenue Service of plaintiff's administrative application for a tax exempt qualification under section 501(c)(3) of the Internal Revenue Code. Plaintiff has filed a motion for summary judgment alleging that: (1) section 501(c)(3) of the Internal Revenue Code imposes an unconstitutional condition upon the exercise of First Amendment rights; and (2) section 501(c)(3) denies plaintiff the equal protection of the laws in violation of the Fifth Amendment to the Constitution. Defendant has filed a cross-motion for summary judgment which denies both of plaintiff's allegations. For reasons discussed below, we grant defendant's motion for summary judgment and deny plaintiff's motion for summary judgment.

I. Statement of Facts

Both of the parties agree that there are no material facts which will preclude a grant of summary judgment. Plaintiff TWRW is a non-profit organization which was formed for the purpose of representing the general public when tax issues are under consideration in the Congress, the Executive Branch and the courts. TWRW was formed to absorb and carry forward the courtroom and legislative activities which were previously conducted by two other non-profit corporations, Taxation with Representation (TWR) and Taxation with Representation Fund (TWR Fund). The TWR Fund is classified by the Internal Revenue Service as a tax exempt charitable and educational group under section 501(c)(3) of the Internal Revenue Code.[1] TWR is classified by the Internal Revenue Service as a tax exempt social welfare organization under section 501(c)(4) of the

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[1] 26 U.S.C. § 501(c)(3) exempts from taxation:

> Corporations, and any community chest, fund, or foundation, organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes, or to foster national or international amateur sports competition (but only if no part of its activities involve the provision of athletic facilities or equipment), or for the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private shareholder or individual, no substantial part of the activities of which is carrying on propaganda, or otherwise attempting, to influence legislation (except as otherwise provided in subsection (h)), and which does not participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of any candidate for public office.

Internal Revenue Code.[2] Since activities pertaining to current and proposed legislation constituted the principal function of TWR, TWR did not qualify as an organization exempt from federal taxation under section 501(c)(3) because it could not meet the requirement of that section that "no substantial part" of its activities consist of "attempting to influence legislation." 26 U.S.C. § 501(c)(3). In order to avoid the inefficiencies attendant to this division of functions, TWRW was formed to absorb the public interest law firm function of the TWR Fund (consisting primarily of courtroom and administrative representation of ordinary taxpayers) and the public interest lobbying functions of TWR (consisting largely of representation of ordinary taxpayers at Congressional hearings).

After incorporation, TWRW applied to the Internal Revenue Service for an exemption under section 501(c)(3). On February 14, 1978, the Internal Revenue Service denied this application on the ground that attempts to influence legislation may constitute a substantial part of TWRW's activities. *See* Affidavit of Thomas F. Field, ¶ 15, attached to plaintiff's motion for summary judgment. (Field Affidavit).

If TWRW were exempt from federal income taxation under section 501(c)(3) of the Internal Revenue

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[2] 26 U.S.C. § 501(c)(4) exempts from taxation:

> Civic leagues or organizations not organized for profit but operated exclusively for the promotion of social welfare, or local associations of employees, the membership of which is limited to the employees of a designated person or persons in a particular municipality, and the net earnings of which are devoted exclusively to charitable, educational, or recreational purposes.

Code, it would also be eligible to receive contributions which would be tax deductible to donors under sections 107(c)(2) (income tax), 2055(a)(2) (estate tax), 2106(a)(2) (estate tax), and 2522(a)(2) (gift tax), of the Internal Revenue Code. Because contributions to TWRW are not tax deductible to donors, plaintiff claims that denial of a section 501(c)(3) exemption would reduce the amount of funds which TWRW could raise from individuals. In addition, foundations may be unlikely to contribute to a non-exempt organization because section 4945(d)(5) of the Internal Revenue Code subjects foundations to tax liability if they make contributions to an organization which engages in substantial lobbying.

II. First Amendment Challenge to Lobbying Limitation of Section 501(c)(3)

Plaintiff contends that section 501(c)(3) imposes an unconstitutional restriction upon the exercise of First Amendment rights in two respects. First, it alleges that the denial of a section 501(c)(3) exemption to organizations which engage in lobbying as a substantial part of their activities is an unconstitutional condition upon the exercise of First Amendment rights, i.e., the right to engage in legislative activity. Second, it claims that the section 501(c)(3) lobbying limitation also restricts the exercise of First Amendment rights because it is a discriminatory denial of a tax exemption for engaging in speech. Plaintiff finally alleges that these restrictions on First Amendment rights cannot be justified because they are not supported by a compelling governmental interest.

A. Denial of Exemption as an Unconstitutional Condition Upon First Amendment Rights

It is beyond dispute that lobbying activities which are directed toward influencing Congressional policies constitute an exercise of the First Amendment right of petition. *Eastern R. R. President Conference* v. *Noerr Motor Freight, Inc.*, 365 U.S. 127, 137-138 (1961); *Liberty Lobby, Inc.* v. *Pearson*, 390 F.2d 489, 491 (D.C.Cir. 1968). In addition, the general advocacy of ideas is protected under the First Amendment as part of our "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open." *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 270 (1964). The legislation-related activities which are described in section 501(c)(3) are therefore clearly protected by the First Amendment.

No organization may qualify for a tax exemption under section 501(c)(3) if it has a "substantial part" of its activities "carrying on propaganda, or otherwise attempting, to influence legislation." 26 U.S.C. § 501(c)(3). This section does not on its face prohibit TWRW from engaging in substantial efforts to influence legislation. The Court of Appeals for the Fourth Circuit has recently addressed this identical constitutional issue in an action filed by a related organization and has found that plaintiff's position is fully answered by the Supreme Court's decision in *Cammarano* v. *United States*, 358 U.S. 498 (1959). *See Taxation With Representation* v. *United States*, No. 76-2418 (4th Cir., October 30, 1978). Following these precedents, we find that the lobbying restriction of section 501(c)(3) does not impose an unconstitutional condition on plaintiff's First Amendment rights.

In *Cammarano*, the Supreme Court upheld the constitutionality of a regulation issued under the Internal Revenue Code of 1939 which excluded from deductions for "ordinary and necessary business expenses" any amounts which had been expended "for the promotion or defeat of legislation." The Court stated that:

> Petitioners are not being denied a tax deduction because they engage in constitutionally protected activities, but are simply being required to pay for these activities entirely out of their own pocketbook, as everyone else engaging in similar activities is required to do under the provisions of the Internal Revenue Code.

Cammarano v. *United States*, *supra*, at 513. As was the case in *Cammarano*, petitioners here are not being denied a deduction because they engage in constitutionally protected activities but instead are merely required to fund these activities from their own resources.[a] *Accord Haswell* v. *United States*, 500 F.2d 1133 (Ct.Cl. 1974), *cert. denied*, 419 U.S. 1107 (1975); *Christian Echoes National Ministry* v. *United States*, 470 F.2d 849 (10th Cir. 1972), *cert. denied*, 414 U.S. 864 (1973); *"Americans United," Inc.* v. *Walters*, 477 F.2d 1169 (D.C.Cir. 1973), *reversed on other grounds sub nom., Alexander* v. *"Americans United," Inc.*, 416 U.S. 752 (1974).

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[a] The principal decisions upon which plaintiff relies, *Speiser* v. *Randall*, 357 U.S. 513 (1958); *Grosjean* v. *American Press Co.*, 297 U.S. 233 (1936); *First National Bank of Boston* v. *Bellotti*, —— U.S. ——, 98 S.Ct. 1407 (1978), and *Community-Service Broadcasting of Mid-America, Inc.*, —— F.2d ——, No. 76-1081 (D.C. Cir. August 25, 1978), do not distinguish *Cammarano* from the instant case.

B. Discriminatory Denial of Exemption as an Unconstitutional Limitation Upon First Amendment Rights

Plaintiff contends that the decision in *Speiser* v. *Randall*, *supra* established the general proposition that "a discriminatory denial of a tax exemption for engaging in speech is a limitation on free speech." *Id.* at 518. Reasoning from this proposition, plaintiff next asserts the section 501(c)(3) lobbying condition is such a discriminatory denial because similar organizations enjoy the tax benefits which are otherwise available to section 501(c)(3) organizations without having to satisfy the no substantial lobbying requirement. *See* 26 U.S.C. §§ 501(c)(4) (exemption from taxation for social welfare organizations); 501(c)(5) (exemption from taxation for labor and agricultural organizations); 501(c)(6) (exemption from taxation for business leagues and chambers of commerce); 501(c)(8) (exemption from taxation for fraternal societies); 501(c)(9) (exemption from taxation for veterans' organizations). Moreover, because of a legislative development subsequent to *Cammarano*, business taxpayers, labor organizations, and trade associations may now deduct expenses or portions of membership dues related to legislation directly affecting the taxpayers or members. 26 U.S.C. § 162(e).

The lynchpin of plaintiff's argument is its interpretation of the holding in *Speiser*, *supra*. *Speiser* simply is inapposite to this case.[4] The discrimination to which the *Speiser* Court referred was governmental legislation "aimed at the suppression of danger-

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[4] In *Speiser*, the Supreme Court struck down a California statute which required veterans to take a loyalty oath as a condition for the receipt of a veterans property tax exemption.

ous ideas." *Id.* at 519. The denial of a section 501(c)(3) exemption is not aimed at the suppression of dangerous ideas. Any organization which would otherwise qualify for a section 501(c)(3) exemption is free to advocate, at its own expense, any legislative policies it may choose. This section does not involve any attempt to condition a tax benefit upon a specific type of speech, such as the loyalty oath at issue in *Speiser*. We therefore find that the substantial legislative activities limitation of section 501(c)(3) does not constitute a discriminatory denial of a tax exemption for engaging in speech.

C. Standard of Judicial Scrutiny

Because of our holding that section 501(c)(3) does not involve an infringement of First Amendment rights, this section is otherwise constitutional if it is rationally related to a legitimate government purpose. *See generally United States* v. *O'Brien*, 391 U.S. 367 (1968); *Schenk* v. *United States*, 249 U.S. 47 (1919). *See generally*, Note, *Of Interests, Fundamental and Compelling: The Emerging Constitutional Balance*, 57 Boston U.L.Rev. 462 (1977). These conditions limiting substantial lobbying activity serve several legitimate purposes: assurance of governmental neutrality with respect to the lobbying activities of charitable organizations; prevention of abuse of charitable lobbying by private interests; and preservation of a balance between the lobbying activities of charitable organizations and those of non-charitable organizations and individuals. An Internal Revenue Code provision such as section 501(c)(3) is clearly a rational means for achieving these purposes.

III. Equal Protection Challenge

As an additional constitutional challenge, plaintiff alleges that section 501(c)(3) constitutes a denial of equal protection violative of the Fifth Amendment because similarly situated organizations are accorded different treatment with respect to their lobbying activities. A classification which accords differing treatment to classes must be justified by a compelling governmental interest if the classification affects a "fundamental" right or involves a "suspect" class. *See, e.g., San Antonio Independent School District* v. *Rodriquez*, 411 U.S. 1, 40 (1973); *Dunn* v. *Blumstein*, 405 U.S. 330, 335-37 (1972); *Shapiro* v. *Thompson*, 394 U.S. 618, 634 (1969). We have previously held that section 501(c)(3) does not infringe First Amendment rights which are fundamental. Plaintiff does not, and cannot, contend that charitable organizations are a "suspect" class. The applicable standard of scrutiny is whether the challenged classification is reasonably related to legitimate governmental purpose. *See, e.g., United States Department of Agriculture* v. *Moreno*, 413 U.S. 528, 534 (1973); *Frontiero* v. *Richardson*, 411 U.S. 677, 683 (1973). We have already held that section 501(c)(3) satisfies this standard in the context of plaintiff's First Amendment challenge. Accordingly, section 501(c)(3) also satisfies this standard in the context of plaintiff's equal protection challenge.

An order consistent with this opinion has been entered this day.

/s/ John H. Pratt
JOHN H. PRATT
United States District Judge

January 31st, 1979.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 78-834

TAXATION WITH REPRESENTATION OF WASHINGTON, PLAINTIFF

vs.

W. MICHAEL BLUMENTHAL, ET AL., DEFENDANTS

[Filed Jan. 31, 1979]

ORDER

Upon consideration of plaintiff's motion for summary judgment, defendants' cross-motion for summary judgment, plaintiff's opposition thereto, and the entire record of the action, it is this 31st day of January, 1979

ORDERED, that plaintiff's motion for summary judgment be and hereby is denied; and it is

ORDERED, that defendants' motion for summary judgment be and hereby is granted; and it is further

ORDERED, that this action be and hereby is dismissed.

/s/ John H. Pratt
JOHN H. PRATT
United States District Judge

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 79-1464

TAXATION WITH REPRESENTATION OF WASHINGTON, APPELLANT

v.

DONALD T. REGAN, SECRETARY OF THE TREASURY, ET AL.

Appeal from the United States District Court for the District of Columbia

(D.C. Civil Action No. 78-0834)

Argued En Banc October 14, 1981

Decided March 26, 1982

Before ROBINSON, *Chief Judge*, and WRIGHT, TAMM, MACKINNON, ROBB, WILKEY, WALD, MIKVA, EDWARDS, and GINSBURG, *Circuit Judges*.

Opinion for the court filed by *Circuit Judge* MIKVA.

Dissenting opinion filed by *Circuit Judge* MACKINNON, in which *Circuit Judges* ROBB and WILKEY concur.

MIKVA, *Circuit Judge*: Taxation with Representation of Washington (Taxation) challenges the lobbying restrictions on certain nonprofit organizations required by Section 501(c)(3) of the Internal Revenue Code, 26 U.S.C. § 501(c)(3), as a violation of its First Amendment and equal protection rights. The whole of Taxation's argument well exceeds the sum of its parts. Taxation's case is weak if it is viewed solely as a First Amendment claim, because the Constitution does not require Congress to subsidize First Amendment activity. Taxation also has a weak case solely in terms of equal protection; Congress has vast leeway under the Constitution to classify the recipients of its benefits and to favor some groups over others. But a First Amendment concern must inform the equal protection analysis in this case. Courts must scrutinize with special care any act by Congress that facilitates the speech of one speaker over another, even when legislation is enacted in the dry, classification-ridden context of the Internal Revenue Code. By subsidizing the lobbying activities of veterans' organizations while failing to subsidize the lobbying of Taxation and other charitable groups, Congress has violated the equal protection guarantees of the Constitution. The district court erroneously rejected Taxation's constitutional challenge, and we accordingly reverse.

Because this case is complex, it may be useful to set out in advance the path that our reasoning follows. The opinion begins with an explanation of the internal revenue provisions at issue (cited as I.R.C. or by Section) and the discrimination established by those provisions. In the second part of the opinion, we explain why the statute's classifications must be given close judicial scrutiny. The third section then

identifies and assesses the substantiality of the governmental interests said to justify the discrimination, and concludes that the statute is unconstitutional. The final section of the opinion discusses the appropriate remedy for this violation and the need for a remand to the district court.

I. BACKGROUND

Taxation is a nonprofit charitable and educational organization that was formed to represent the general public on tax issues before Congress, the courts, and the executive branch.[1] After its incorporation

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[1] Taxation was created as the result of a merger between two other organizations, Taxation with Representation Fund (TWRF), a group devoted to courtroom advocacy, and Taxation with Representation (TWR), a group devoted to legislative activity. TWR had been incorporated in 1970 as a social welfare organization exempt from federal income taxes under Section 501(c)(4), 26 U.S.C. § 501(c)(4) [hereinafter cited as I.R.C.], but liable for unemployment taxes and ineligible for tax deductible contributions under I.R.C. § 170. In 1974, TWR was denied classification as a Section 501(c)(3) organization, and appealed unsuccessfully in *Taxation with Representation* v. *United States*, 585 F.2d 1219 (4th Cir. 1978), *cert. denied*, 441 U.S. 905 (1979).

Taxation apparently absorbed the functions of TWR after TWR lost its appeal, *see* Brief for Appellee United States (IRS Brief) at 4, and Taxation makes the same claims here that were rejected by the Fourth Circuit. Despite this close relationship between issues and parties, however, the government has not pleaded or argued that Taxation should be precluded by res judicata from litigating this case, and we decline to reach the question *sua sponte*.

Several litigants in this and other courts have also unsuccessfully raised issues related to those we decide here. *See, e.g.*, *Christian Echoes National Ministry, Inc.* v. *United States*, 470 F.2d 849 (10th Cir. 1972), *cert. denied*, 414 U.S. 864 (1973) (religious organization challenged loss of exemption

in June 1977, Taxation applied to the Internal Revenue Service (IRS) for a declaration that it was an organization described in Section 501(c)(3).[2] Al-

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as result of substantial legislative activity as violation of free exercise clause); *Haswell* v. *United States*, 500 F.2d 1133 (Ct. Cl. 1974), *cert. denied*, 419 U.S. 1107 (1975) (taxpayer sued for refund on theory that his contributions to organization that engaged in extensive lobbying should have been deductible as charitable contributions); *Tax Analysts & Advocates* v. *Shultz*, 376 F. Supp. 889 (D.D.C. 1974), *app. dismissed mem. sub nom. Tax Analysts & Advocates* v. *Simon*, 512 F.2d 992 (D.C. Cir. 1975) (suit for declaratory judgment that legislative activity restrictions of Section 501(c)(3) were unconstitutional dismissed because action barred by I.R.C. § 7421(a), barring suits to restrain or enjoin collection of taxes). Taxation with Representation was also a party to the latter suit, but its complaint was dismissed without prejudice. *See* 35 A.F.T.R.2d 1352.

[2] Section 501(c)(3) applies to:

> Corporations, and any community chest, fund, or foundation, organized and operated exclusively for religious, *charitable*, scientific, testing for public safety, literary, or *educational* purposes, or to foster national or international amateur sports competition (but only if no part of its activities involve the provision of athletic facilities or equipment), or for the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private shareholder or individual, *no substantial part of the activities of which is carrying on propaganda, or otherwise attempting, to influence legislation* (except as otherwise provided in subsection (h)), and which does not participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of any candidate for public office.

(emphasis added). Such organizations are exempt from taxation under the income tax subtitle unless such exemption is denied under I.R.C. §§ 502, 503, and 504.

though Taxation otherwise qualified for tax-exempt status under that section, it did not meet the requirements that "no substantial part" of its activities consist of "attempting to influence legislation." The IRS specifically found that Taxation's "stated purposes include attempting to influence legislation, and legislative advocacy may constitute a substantial part of your activities." Notification of Adverse Ruling, February 14, 1978, Joint Appendix (J.A.) 48. As a result, Taxation was ineligible for several tax benefits provided by Section 501(c)(3), particularly the eligibility to receive tax-deductible contributions from donors.[3]

Taxation exhausted its administrative remedies, and then sought in May 1978 to overturn the IRS decision by bringing a declaratory judgment action under I.R.C. § 7428.[4] Upon consideration of cross-motions for summary judgment, the district court ruled for the defendants. Memorandum Opinion, January 31, 1979, J.A. 56-64. Taxation appealed the district court's decision, and a three-judge panel of this court decided on April 14, 1981, to uphold the trial court. On June 11, 1981, a majority of the full court of appeals voted to vacate the panel opinion and rehear the case *en banc*.

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[3] *See* I.R.C. § 170(c). Other tax benefits accruing to a § 501(c)(3) organization include exemption from federal social security taxes (FICA), I.R.C. § 3121(a), and exemption from federal unemployment taxes (FUTA), I.R.C. § 3306.

[4] I.R.C. § 7428 authorizes certain courts to issue declaratory judgments in appropriate cases relating to the status and classification of organizations under I.R.C. § 501(c)(3). Congress enacted this section of the Code as part of the Tax Reform Act of 1976, Pub. L. No. 94-455, 90 Stat. 1520.

A. *The Statutory Scheme*

Before considering the issues presented by this case, it is first necessary to examine the classifications that are under review. Congress has excluded various types of organizations from the taxing provisions of the Code, and I.R.C. § 501 "is the linchpin of the statutory benefit system." *Simon* v. *Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26, 29 n.1 (1976). This section describes several dozen kinds of organizations that are exempt from federal taxation on the income they receive.

There are other important components of the tax benefits provided by Section 501 in conjunction with other provisions of the Code, however. The chief source of income for many of the nonprofit organizations described in the statute is private contributions. In order to encourage such giving, Congress has frequently provided that contributors to various Section 501(c) organizations may take a deduction based on the amount of the contribution. Because the Code imposes three general taxes on individuals —on income, gifts, and estates—the provisions allowing contributors to take these deductions appear in three separate portions of the Code. *See* I.R.C. §§ 170, 2055, 2522. Aside from this complexity, however, the general scheme is simple. Congress has accorded certain organizations a double benefit: exemption from taxes on their own income, and eligibility to receive contributions and gifts that are deductible from the donors' taxes as well. Throughout this opinion, tax exemption refers to the first benefit, and tax-deductibility to the second.

Every organization described in Section 501 enjoys some form of tax exemption, but only some are eligible to receive tax-deductible contributions.

The status of any particular organization, of course, can only be ascertained by examining the other portions of the Code that provide deductions to the organization's donors. A further complication lies in the fact that the Code differentiates among those organizations eligible to receive tax-deductible contributions in terms of the uses to which the organization's income may be put. For the purposes of this case, the crucial distinction promoted by Section 501 is between organizations that may not receive tax-deductible contributions if they lobby substantially, and organizations that may receive such contributions even if they do.

Section 501(c)(3) organizations—sometimes simply called "charitable" organizations—are examples of the former. A donor to such an organization may deduct his contributions to it by virtue of the relevant provisions in the Code. See I.R.C. § 170(c)(2) (income tax deductions); I.R.C. §§ 2055(a)(2), 2106(a) (estate tax deductions); I.R.C. § 2522(a) (gift tax deductions).[5] The Code limits the amount

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[5] I.R.C. § 170(a) states the "general rule" that deductions shall be allowed for "any charitable contribution," defined in subsection (c). Section 170(c) defines "charitable contribution" as a contribution or gift to or for the use of

> (2) A corporation, trust, or community chest, fund, or foundation—
>
> > (A) created or organized in the United States or any possession thereof, or under the law of the United States, any State, the District of Columbia, or any possession of the United States;
> >
> > (B) organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes, or to foster national or international amateur sports competition (but only if no part of its activities involve the provision of athletic facilities

of lobbying that may be conducted by the Section 501(c)(3) organization, however, whether or not the lobbying is related to its exempt purpose.[6] *See*

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or equipment), or for the prevention of cruelty to children or animals;

(C) no part of the net earnings of which inures to the benefit of any private shareholder or individual; and

(D) *which is not disqualified for tax exemption under section 501(c)(3) by reason of attempting to influence legislation,* and which does not participate in, or interevne in (including the publishing or distributing of statements), and political campaign on behalf of any candidate for public office.

(emphasis added). Similar language permits donors to make analogous deductions with respect to gift tax, I.R.C. § 2522(a)(2) (citizens or residents) and (b)(2) (nonresident aliens), and estate tax, I.R.C. §§ 2055(a)(3) (citizens or residents) and 2106(a)(2)(A)(ii) (nonresident aliens). Gift and estate tax deductions will soon become of less significance, however, in light of changes made by the Economic Recovery Tax Act of 1981, Pub. L. No. 97-34, 95 Stat. 172. As a final point, foundations may be deterred from contributing to an organization lacking § 501(c)(3) status because foundations and their managers are subject to tax if the foundation pays any amount "to carry on propaganda, or otherwise to attempt to influence leigslation." I.R.C. § 4945(a) and (d)(1).

[6] *See, e.g.*, Rev. Ruling 67-293, 1967-2 *Cum. Bull.* 185 (nonprofit organization that operates facility for protection of stray animals does not qualify for exemption if a substantial part of its activities consists of attempts to influence state and local legislation related to welfare of animals); *Kuper* v. *Commissioner*, 332 F.2d 562, 563 (3d Cir. 1964) (upholding disallowance of deduction for contributions to local chapter of League of Women Voters because of "the general legislative program of the League"); *League of Women Voters* v. *United States*, 180 F. Supp. 379, 383 (Ct. Cl. 1960) (forum discussions by members in formulating position to be taken on questions of public interest held to constitute "preparation

Slee v. *Commissioner*, 42 F.2d 184 (2d Cir. 1930). Section 501(c)(4) organizations, on the other hand, are exempt from income taxes even if they engage in substantial lobbying. These organizations are not eligible to receive tax-deductible contributions, however.[7]

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for the influencing of legislation" and were therefore legislative activities). "In practice, the *in terrorem* effect of the vague statutory proscription causes many charities to avoid most direct or indirect efforts to support or oppose legislation, even when the legislation is directly related to the charitable purposes for which they are organized and operated." Caplin & Timbie, *Legislative Activities of Public Charities*, 39 L. & CONTEMP. P. 183, 196 (Autumn 1975). This effect flowed from the inherent ambiguity of the statute. *See Krohn* v. *United States*, 246 F. Supp. 341, 347-48 (D.Colo. 1965) (meaning of "substantial" may vary with different types of organizations, and may turn on extent of the organization's other noncharitable activities as well as the extent of its charitable activities).

Congress sought to ease this problem somewhat in the Tax Reform Act of 1976, Pub. L. No. 94-455, 90 Stat. 1720, which allows certain public charities to be governed by new Code sections 501(h) and 4911. These allow the organization to devote a percentage of its resources to lobbying, and thus provide explicit dollar ceilings on lobbying rather than requiring the organization to adhere to the less certain "substantiality" test of Section 501(c)(3). All charities, however, continue to have their lobbying restricted under one standard or the other. "Taxation has not made, and does not plan to make, an election to be covered by the new provisions." Taxation Brief at 27 n.9. The new standard is accordingly not before us and is of little relevance to the discussion below. *But* see note 40 *infra*.

[7] Section 501(c)(4) applies to:

> Civic leagues or organizations not organized for profit but operated exclusively for the promotion of social welfare, or local associations of employees, the membership of

In contrast, other Section 501(c) organizations may receive tax-deductible contributions without regard to any lobbying limitation. Contributions to certain cemetery or burial companies, which are exempt under Section 501(c)(13), are deductible under Section 170(c)(5) without explicit statutory limitations concerning lobbying activities.[8] The same is true of contributions to the federal or state governments for exclusively public purposes. *See* Section 170(c)(1). Labor unions and business leagues are exempt under Sections 501(c)(5) and 501(c)(6) respectively, even if lobbying is their primary purpose. Contributions to such organizations, usually in the form of dues, generally are deductible only to the extent they are "business expenses."[9]

Analysis of where other Section 501(c) organizations fall in this scheme is complicated by the fact that IRS regulations may impose lobbying limitations even when the Code itself is silent. Fraternal beneficiary societies that operate through local lodges and meet certain other requirements, for example,

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which is limited to the employees of a designated person or persons in a particular municipality, and the net earnings of which are devoted exclusively to charitable, educational, or recreational purposes.

[8] Such companies must be barred by their charters, however, from engaging in any other activities. I.R.C. § 170(c)(5).

[9] These sections thus track I.R.C. § 162(e), described in more detail at pp. 33-34 *infra*. Section 162(e) was enacted by Congress in 1962 to allow business to deduct the costs of lobbying directly related to legislation of interest to the taxpayer. If Section 501(c)(5) and (6) organizations use dues for lobbying, the dues are deductible by contributors only to the extent that the requirements of Section 162(e) are satisfied.

are exempt under Section 501(c)(8).[10] Although contributions to such societies are tax-deductible only if the contributions are to be used for the group's exempt purposes, the statute imposes no lobbying restriction for gift or income tax purposes, but does for estate tax purposes. *Compare* I.R.C. § 2055(a)(3) (explicit limitation for estate tax purposes) *with* I.R.C. § 2522(a)(3) (no restriction for gift tax purposes) *and* I.R.C. § 170(c)(4) (no restriction for income tax purposes). Treasury Regulations appear to fill this gap, however. The regulations provide that a charitable fund operated by a fraternal beneficiary society will not qualify for tax-deductible contributions under these provisions if the society is an "action organization," which includes organizations that engage in substantial lobbying. Treas. Reg. § 1.501(c)(3)-1(c)(3). *See, e.g., id.* § 25.2522(a)-1(a)(4) (gift tax deductions); *id.* § 1.170A-

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[10] Section 501(c)(8) and (10) provide for exemption of

> (8) Fraternal beneficiary societies, orders, or associations—
>
> > (A) operating under the lodge system or for the exclusive benefit of the members of a fraternity itself operating under the lodge system, and
> >
> > (B) providing for the payment of life, sick, accident, or other benefits to the members of such society, order, or association or their dependents.
>
> . . . .
>
> (10) Domestic fraternal societies, orders, or associations, operating under the lodge system—
>
> > (A) The net earnings of which are devoted exclusively to religious, charitable, scientific, literary, educational, and fraternal purposes, and
> >
> > (B) which do not provide for the payment of life, sick, accident, or other benefits.

1(h)(5) (income tax deductions); *id.* § 2055(a) (estate tax deductions). Despite the impression given by the statute alone, then, fraternal beneficiary societies resemble Section 501(c)(3) organizations because they are barred by regulation from using tax-deductible contributions to engage in substantial lobbying.

Veterans' organizations, which are exempt under Section 501(c)(19), require even closer analysis than fraternal beneficiary societies. Unlike Section 501(c)(3) organizations, veterans' organizations are not subjected to a lobbying limitation as a prerequisite for receiving tax-deductible contributions. *See, e.g.*, I.R.C. § 170(c)(3) (income tax deductions); I.R.C. § 2055(a)(4) (estate tax deductions); I.R.C. § 2522(a)(4) (gift tax deductions). Again, however, Treasury Regulations condition exemption from income taxes on whether such groups devote themselves "exclusively" to certain veterans' functions. *See* Treas. Reg. § 1.501(c)(19)-1. Moreover, the Treasury regulations seem to require that veterans' groups obey a lobbying limitation in order to enable their contributors to deduct donations for income tax purposes, *id.* § 170A-1(h)(5), if not for estate or gift tax purposes. In practice, however, veterans' organizations enjoy very different tax treatment. Counsel for the government candidly admitted during oral argument that the regulation governing deductibility of contributions for income tax purposes is not enforced with regard to veterans groups, and the IRS has stated that it will not challenge income tax deductions taken with regard to donations made to these groups. IRS Publication No. 78, Cumulative List of Organizations Described in Section 170(c) of the Internal Revenue Code of 1954 (1980).

B. *Consequences Suffered by Taxation*

The effect of the statutory scheme, with regulations engrafted, is that different exempt organizations receive disparate tax treatment depending on their lobbying activities. Section 501(c) runs the gamut from organizations that may lobby but receive no tax-deductible contributions, *e.g.*, Section 501(c)(4); organizations that may receive tax-deductible contributions but may not lobby, *e.g.*, Section 501(c)(3); and organizations that in practice may do both, *i.e.*, veterans' organizations under Section 501(c)(19). An organization such as Taxation may not receive tax-deductible contributions if it engages in "substantial" lobbying, but a qualifying veterans' organization may continue to receive tax-deductible contributions even if it lobbies as much and on as many issues as it chooses.

Perhaps as a result of this uneven treatment, veterans' groups such as the American Legion and the Veterans of Foreign Wars are active before Congress on a large number of different issues. The American Legion and its affiliates "have historically been among the most active lobbying organizations on the national scene." Troyer, *Charities, Law-Making, and the Constitution: The Validity of the Restrictions on Influencing Legislation*, 31 N.Y.U. INST. ON FED. TAX. 1415, 1439 (1973). Veterans' organizations have sought to influence legislation involving ratification of the Panama Canal treaties, Alaska national parks, national security issues, and elimination of Saturday mail delivery.[11] But a § 501(c)(3) charitable organi-

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[11] *See, e.g., Inclusion of Alaska Lands: Hearings Before the Subcommittee on General Oversight and Alaska Lands of the House Committee on Interior and Insular Affairs*, 95th Cong., 1st Sess. 100 (1977) (statement of Delmar L. Shull,

zation, such as one formed to promote health care, may not engage in substantial lobbying even when the legislation relates directly to its exempt purpose, say a bill for the construction of more hospitals.

Two preliminary arguments, which could be said to concern standing, should be addressed before turning to the central issues of this case. First, the government notes that because a charitable organization may be exempt from payment of income taxes under Section 501(c)(4) even if it engages in substantial lobbying, Section 501(c)(3) in no way constitutes a direct governmental interference with Taxation's lobbying. Supplemental Brief for Appellee

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VFW); *Six-Day Mail Delivery: Hearings Before the House Committee on the Post Office and Civil Service*, 95th Cong., 1st & 2d Sess. 197 (1977-1978) (statement of Spike Brooker, Commander, Post 58, American Legion); *id.* at 216 (statement of Robert Copenbarger, VFW Post of El Paso); *Postal Service Act of 1977: Joint Hearings Before the Subcommittee on Postal Operations and Services and Subcommittee on Postal Personnel and Modernization of the House Committee on the Post Office and Civil Service*, 95th Cong., 1st Sess. 103 (1977) (statement of James F. O'Neil, publisher, American Legion magazine); *id.* at 106 (statement of Donald H. Schwab, director national legislative service, VFW); *Department of Defense Appropriations for 1977: Hearings Before a Subcommittee of the House Committee on Appropriations*, 95th Cong., 2d Sess., pt. 8, 685-710 (1978) (National Security Resolution adopted by the 59th National Convention of the American Legion supporting, inter alia, development of the B-1 bomber, M-X missile, cruise missiles, and reestablishment of selective service system). Veterans' organizations have even lobbied on matters that presumably have special interest to organizations such as Taxation. *E.g., Tax Simplification Proposals: Field Hearings Before the Subcommittee on Oversight of the House Committee on Ways and Means*, 95th Cong., 1st & 2d Sess. 234 (1977-1978) (statement of James Lund, VFW).

United States (IRS Supp. Brief) at 14. The implication is that Taxation has suffered no injury from denial of Section 501(c)(3) status because the provisions of the Code "neither restrict Taxation's lobbying activities nor deny Taxation tax exempt status because of its planned activities." *Id.* As the description of the statutory scheme shows, however, disparate tax benefits depend on the specific statutory provision under which an organiaztion is determined to be exempt from federal income tax. Taxation's lack of Section 501(c)(3) status causes it substantial disadvantages, notably exclusion from the IRS "Cumulative List" of organizations entitled to receive tax-deductible donations and foundation grants.[12] "[A]ppearance on the Cumulative List is a prerequisite to successful fund raising for most charitable organizations. Many contributors simply

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[12] IRS Publication No. 78, Cumulative List of Organizations Described in Section 170(c) of the Internal Revenue Code of 1954 (1980) (periodically updated). "The listing of an organization in [the Cumulative List] signifies it has received a ruling or determination letter . . . stating that contributions by donors to the organization are deductible as provided in section 170 of the Code." Rev. Proc. 72-39, 1972-2 *Cum. Bull.* 818. "The Service has announced that, with narrowly limited exceptions, a donor may rely on the Cumulative List for so long as the beneficiaries of his largesse maintain their listing, regardless of their actual tax status." *Bob Jones University* v. *Simon*, 416 U.S. 725, 729 (1974). An organization's loss of this status, and "the crucial right to receive deductible contributions," is "tantamount to a death sentence." Caplin & Timbie, *supra* note 6, at 195. "From the practical point of view, charities are not very much concerned about their own taxes. . . . It is, however, vital that they qualify as exempt charities in order that donors may deduct contributions made to them." Clark, *The Limitation on Political Activities: A Discordant Note in the Law of Charities*, 46 VA. L. REV. 439, 445-46 (1960).

will not make donations to an organization that does not appear on the Cumulative List." *Bob Jones University* v. *Simon*, 416 U.S. 725; 729-30 (1974). It is therefore irrelevant to Taxation's case that it might lobby substantially and still be exempt from payment of income taxes under Section 501(c)(4).[13]

A second preliminary argument suggested by the government is related to the first. Because the chief effect of Taxation's refusal to comply with the "no substantial lobbying" clause of Section 501(c)(3) is that its contributors may not make tax deductible contributions, the government implies that Taxation is not the proper party to bring this case. IRS Supp. Brief at 19. "The attenuated effect on Taxation of denying a deduction to its potential contributors" is said not to constitute a "significant encroachment" or "serious infringement" of Taxation's right to lobby, *id.*, and "does not infringe Taxation's First Amendment rights," *id.* at 26. This argument too may be easily dismissed. Taxation has standing to raise First Amendment claims on behalf of its members and supporters,[14] and it is clearly evident that

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[13] It is far from clear, however, that Taxation could seek tax-exempt status as a social welfare organization after denial of Section 501(c)(3) status. In 1976, Congress provided that a Section 501(c)(3) organization that forfeits its exemption by lobbying may not then qualify as a social welfare organization under Section 501(c)(4). See I.R.C. § 504. Congress enacted that provision to prevent a Section 501(c)(3) organization from "build[ing] up an endowment out of deductible contributions as a charitable organization and then us[ing] that tax-favored fund to support substantial amounts of lobbying as a section 501(c)(4) social welfare organization." S. REP. No. 938, pt. 2, 94th Cong., 2d Sess. 83, *reprinted in* [1976] U.S. CODE CONG. & AD. NEWS 4030, 4107-08.

[14] *See, e.g.*, *NAACP* v. *Alabama*, 357 U.S. 449, 458 (1958) (an organization may assert, on behalf of its members, cer-

Taxation will be harmed if its contributors cease giving it money. Regardless of the merits of its case, Taxation undoubtedly is an appropriate party to bring this action.

In short, Taxation has complained that Section 501(c) exposes the lobbying of various tax-exempt groups to discriminatory tax treatment and thereby violates Taxation's First Amendment and equal protection rights. The statutory provision effectively limits the ability of charitable organizations to present to legislators their views on legislation even when the legislation directly affects their charitable objects. There is a difference, of course, between showing that a statute has a discriminatory application and that it is unconstitutional. But Taxation has met the threshold requirement of demonstrating injury from the unequal application of a statute,[15]

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tain of their First Amendment rights); *Bates* v. *Little Rock*, 361 U.S. 516, 523 n.9 (1960). In *Buckley* v. *Valeo*, 424 U.S. 1, 12 (1976), the Court held that appellants had standing to challenge a limitation of $1,000 on individual contributions. The limitation "precludes most associations from effectively amplifying the voice of their adherents" and "is simultaneously an interference with the freedom of [their] adherents." *Id.* at 22 (quoting *Sweezy* v. *New Hampshire*, 354 U.S. 234, 250 (1957) (plurality opinion)).

[15] The government also makes the astounding argument that "discrimination" is not shown simply because of "disparities in the treatment accorded somewhat similarly situated taxpayers—particularly organizations exempt from tax under different provisions of the Code," and that "the federal tax laws pertaining to the lobbying activities of tax exempt organizations are no less 'neutral' now" than they were in 1959, before Congress enacted Section 162(e). IRS Supp. Brief at 24. The Supreme Court has soundly repudiated the conten-

and it is to the constitutionality of that statute we now turn.

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tion that the demands of equal protection are met when the law applies equally to all within the statutory class:

> application among the members of the class defined by Judicial inquiry . . . does not end with a showing of equal the legislation. The courts must reach and determine the question whether the classification drawn in a statute are reasonable in light of its purpose. . . .

McLaughlin v. *Florida*, 379 U.S. 184, 191 (1964). *See Skinner* v. *Oklahoma ex rel. Williamson*, 316 U.S. 535, 541 (1942); *Rinaldi* v. *Yeager*, 384 U.S. 305, 308-09 (1966).

The dissent suggests that Congress has limited the lobbying and political activities of the nation's more prominent veterans' groups by incorporating them with federal charters that "uniformly contain provisions barring them from engaging in partisan political activity . . . ." Dissent at 33-34. This raises several questions of fact not addressed by the district court, including which of the nation's 22,000 veterans' organizations have such charters and whether these charters are actually enforced. The Veterans of Foreign Wars, for example, does not seem to have charter limitations on its political activities. *See* 36 U.S.C. § 111 *et seq.* (1976). Indeed, the VFW endorsed a presidential candidate in the 1980 election. *See* "The Republicans in Detroit; Veterans' Group Endorses Reagan," Washington Post, July 17, 1980, at A11. Moreover, the fact that some veterans' organizations are federally chartered does not distinguish them from section 501(c)(3) organizations, which may also have federal charters. *See, e.g.*, 36 U.S.C. § 1 (1976) (American National Red Cross); *id.* § 21 (Boy Scouts of America); *id.* § 271 (Future Farmers of America); *id.* § 371 (United States Olympic Committee); *id.* § 461 (National Safety Council); *id.* § 881 (Big Brothers of America). Indeed, the juxtaposition of veterans' organizations and section 501(c)(3) organizations throughout this title illustrates the essential similarity of these "private corporations established under Federal law." *Id.* § 1101.

II. The Appropriate Standard of Review

The starting point for our review must be determination of the appropriate standard to apply in reviewing appellant's constitutional claims. *See Harris* v. *McRae*, 448 U.S. 297, 322 (1980). We find that a high level of scrutiny is required because the lobbying restriction of Section 501(c)(3) constitutes a limitation on protected First Amendment activity, and because Taxation's equal protection argument therefore involves what is clearly a fundamental right.[16] In analyzing the differential treatment challenged here, the question then must be whether a substantial governmental interest supports the classification and whether the classification is narrowly drawn to serve that interest.

A. *First Amendment Implications*

There is no question whatsoever that lobbying comes within the protection of the First Amendment. *See, e.g., California Motor Transport Co.* v. *Trucking Unlimited*, 404 U.S. 508, 510-11 (1972); *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 270 (1964); *Eastern R.R. Presidents Conference* v. *Noerr Motor Freight, Inc.*, 365 U.S. 127, 137-38 (1961). It is also beyond dispute that First Amendment freedoms are fundamental rights in our society. *See, e.g., Schad* v. *Borough of Mount Ephraim*, —— U.S. ——, 49 U.S.L.W. 4597, 4599 (1981); *Central Hudson*

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[16] Because the challenged classification is created by federal statutes, the equal protection guarantees of the Fifth Amendment rather than the Fourteen Amendment apply. *See, e.g., Buckley* v. *Valeo*, 424 U.S. 1, 93 (1976); *Weinberger* v. *Wiesenfeld*, 420 U.S. 636, 638 n.2 (1975); *Johnson* v. *Robison*, 415 U.S. 361, 364 n.4 (1974); *Bolling* v. *Sharpe*, 347 U.S. 497, 499 (1954).

Gas & Electric Corp. v. *Public Service Comm'n*, 447 U.S. 557, 565 (1980). Were this a case in which the government sought to suppress the lobbying activities of Taxation directly, the appropriate level of scrutiny would be obvious. *See, e.g., N.A.A.C.P.* v. *Button*, 371 U.S. 415, 438-39 (1963); *Bates* v. *Little Rock*, 361 U.S. 516, 524 (1960).

First Amendment rights are not abridged, however, merely because the government refuses to subsidize those rights. In *Cammarano* v. *United States*, 358 U.S. 498 (1959), the Supreme Court upheld Treasury regulations that prohibited business deductions of lobbying expenses on the ground that governmental refusal to underwrite lobbying costs does not violate the First Amendment. *See Harris* v. *McRae*, 448 U.S. at 318 (whether Congress should subsidize the exercise of a fundamental constitutional freedom is "not a matter of constitutional entitlement").[17] For the same reasons, in *"Americans United" Inc.* v. *Walters*, 477 F.2d 1169, 1182, (D.C. Cir. 1973), *rev'd on other grounds sub nom. Alexander* v. *"Americans United" Inc.*, 416 U.S. 752 (1974), this court

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[17] This statement was made in the context of only the first of several constitutional arguments rejected in *McRae*, that congressional restriction of the availability of certain medically necessary abortions under Medicaid impinged on the liberty interests protected by the Due Process clause as recognized in *Roe* v. *Wade*, 410 U.S. 113 (1973), and its progeny. See 448 U.S. at 312. The Court elaborated the theme later in the opinion: "It cannot be that because government may not prohibit the use of contraceptives . . . or prevent parents from sending their child to a private school . . ., government, therefore, has an affirmative constitutional obligation to ensure that all persons have the financial resources to obtain contraceptives or send their children to private schools." *Id.* at 318.

followed *Commarano* in dismissing the appellants' claim that Section 501(c)(3)'s lobbying restriction violated the First Amendment on its face.[18]

Taxation makes a valiant attempt to avoid these holdings by claiming that the lobbying restriction of Section 501(c)(3) constitutes an "unconstitutional condition" on the exercise of its First Amendment rights. In *Perry* v. *Sindermann*, 408 U.S. 593, 597 (1972), the Supreme Court explained that "even though a person has no 'right' to a valuable governmental benefit and even though the government may deny him the benefit for any number of reasons," the government "may not deny a benefit to a person on a basis that infringes his constitutionally protected interests—especially, his interest in freedom of speech." *Accord*, *McDaniel* v. *Paty*, 435 U.S. 618, 626 (1978); *Pickering* v. *Board of Educ.*, 391 U.S. 563, 568 (1968); *Shelton* v. *Tucker*, 364 U.S. 479, 485-86 (1960); *Tygrett* v. *Barry*, 627 F.2d 1279 (D.C. Cir. 1980). *Cf. Speiser* v. *Randall*, 357 U.S. 513, 518 (1958) ("conditions imposed upon the granting of privileges or gratuities must be " 'reasonable' "). The Supreme Court's decisions "have pro-

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[18] In reversing, the Supreme Court held simply that Americans United's request for injunctive relief requiring reinstatement of its tax-exempt status was barred by the Anti-Injunction Act's prohibition against suits "for the purpose of restraining the assessment or collection of any tax." 416 U.S. at 757 (quoting I.R.C. § 7421(a)). The Court did not discuss the merits of appellants' case, other than noting that "[t]he consequences of the present regime for § 501(c)(3) organizations can be harsh indeed . . . ." *Id.* at 763 n.14. *See id.* at 782 (Blackmun, J., dissenting) (implying no opinion on merits of underlying controversy, but agreeing with court of appeals that case presented a substantial constitutional question).

hibited conditions on public benefits . . . which dampen the exercise generally of First Amendment rights, however slight the inducement to the individual to forsake those rights." *Elrod* v. *Burns*, 427 U.S. 347, 358 n.11 (1976) (plurality opinion). Taxation could enjoy the "public benefits" of Section 501(c)(3), provided it did not exceed a "substantial" level of lobbying. Because Section 501(c)(3) expressly conditions receipt of these benefits on a charity's willingness to refrain from a greater level of expression, Taxation contends, an unconstitutional condition has been placed on the furnishing of these tax benefits. "The Government has no obligation whatever to grant tax advantages to charities, but if it decides to do so, it cannot condition receipt of the advantages on a surrender of First Amendment rights." Brief for Appellant Taxation (Taxation Brief) at 21.

This argument has some strength, but we reject its premise. It is true that under certain conditions, the indirect aid granted through tax exemptions and deductions is the functional equivalent of a direct government payment.[19] *See Committee for Public*

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[19] *See, e.g.*, Surrey & McDaniel, *The Tax Expenditure Concept and the Budget Reform Act of 1974*, 17 B.C. INDUST. & COMM. L. REV. 679 (1979); *cf.* Dodyk, *The Tax Reform Act of 1969 and the Poor*, 71 COLUM. L. REV. 758 (1971). The government accepts the analogy between tax exemptions and direct governmental subsidies for purposes of this case, while cautioning that they have different characteristics. IRS Supp. Brief at 11 n.12. *See, e.g., Walz* v. *Tax Commission*, 397 U.S. 664 (1970), which held that a property tax exemption for religious organizations does not violate the Establishment Clause of the First Amendment, there being no "genuine nexus between tax exemption and establishment of religion." In *Marker* v. *Shultz*, 485 F.2d 1003 (D.C. Cir. 1973), this

Education and Religious Liberty v. *Nyquist*, 413 U.S. 756, 790-91 (1973) (declaring a tax benefit system invalid under the Establishment Clause); *Green* v. *Connally*, 330 F. Supp. 1150, 1156-57 (D.D.C.), *aff'd mem. sub nom. Coit* v. *Green*, 404 U.S. 997 (1971) (§ 501(c)(3) may not be used to benefit racially discriminatory private schools). "To deny an exemption to claimants who engage in certain forms of speech is in effect to penalize them for such speech. Its deterrent effect is the same as if the State were to fine them for this speech." *Speiser* v. *Randall*, 357 U.S. at 518. Taxation's argument would therefore be troublesome if it were the case that the government conditioned its provision of tax benefits on a charitable organization's waiver of First Amendment rights.[20]

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court held that tax exemptions for unions under Section 501(c)(5) did not constitute state involvement and prohibited support for union political activities. "A tax exemption is consistent with a 'benevolent neutrality' and government noninvolvement with the exempted organization." *Id.* at 1006. *See Moose Lodge No. 107* v. *Irvis*, 407 U.S. 163, 173 (1972) (state provision of necessary services such as police and fire protection, given to everyone without connotation of approval does not constitute fostering or encouragement of racial discrimination).

[20] If this were the case, we would be forced to decide whether the restrictions on charities that received benefits under Section 501(c)(3) were both important and necessary to assure that the objects of the benefit program were attained. *See, e.g., Buckley* v. *Valeo*, 424 U.S. 1, 57 n.65 (1976) (Congress may condition candidates' receipt of federal financing on agreement to abide by limitations on overall campaign expenditures); *Civil Service Comm'n* v. *National Ass'n of Letter Carriers*, 413 U.S. 548 (1973) (upholding restriction of political activity by federal employees). Taxation makes a strong argument that lobbying activities are not inconsistent

It is overly mechanistic, however, to suggest that the Section 501(c)(3) lobbying restriction actually is a condition on the receipt of tax benefits by charities. A group such as Taxation can easily structure itself along dual lines, under both Sections 501(c)(3) and 501(c)(4) of the Code, using the latter organization only for lobbying purposes.[21] Because Section 501(c)(4) organizations may lobby freely without losing the tax benefits for which they qualify, the use of both subsections accords a charitable organization full tax benefits *other than* the ability to lobby with tax-deductible contributions—and this distinction is entirely permissible under *Cammarano*. Charitable organizations are simply not required to waive their First Amendment rights in order to obtain public benefits—they simply may not lobby with tax-deductible contributions—and Taxation's "unconstitutional condition" argument must therefore fail.

As we observed at the outset, then, Taxation has no compelling claim based solely on the First Amendment.[22] We reject "the notion that First Amendment

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with charitable purposes, *see, e.g.*, 2 RESTATEMENT (SECOND) OF TRUSTS § 374 (1959); IV R.W. SCOTT, THE LAW OF TRUSTS § 374 (3d ed. 1967), but our disposition of Taxation's First Amendment claim makes it unnecessary to consider this argument.

[21] As noted above, *see* note 1 *supra*, Taxation in fact originally followed this dual organizational structure. Although a Section 501(c)(3) organization may be barred from converting to a Section 501(c)(4) organization, *see* note 13 *supra*, nothing keeps such an organization from forming a *new* arm at any time and using non-deductible contributions made to it. for lobbying purposes.

[22] Taxation does not challenge the proscription against "substantial lobbying" on grounds of vagueness, however, and that question is not considered in this opinion. *See* Borod, *Lobby-*

rights are somehow not fully realized unless they are subsidized by the State." *Cammarano* v. *United States*, 358 U.S. at 515 (Douglas, J., concurring). We also reject Taxation's 'unconstitutional condition' argument, because charitable organizations are governed by no conditions other than those upheld in *Cammarano*. Taxation has not shown that Section 501(c)(3)'s lobbying restriction abridges its First Amendment rights.

B. *Equal Protection Implications*

Our discussion of Taxation's First Amendment claims does not resolve the appropriate standard of review, because this is not a situation in which the government refuses impartially to subsidize *all* lobbying activities. Although the government need not subsidize the exercise of First Amendment rights, the question remains the appropriate standard of review when government subsidizes the exercise of First Amendment rights in a discriminatory fashion.[23]

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ing for the Public Interest, 42 N.Y.U. L. REV. 1087, 1106-10 (1967); Clark, *supra* note 12, at 451-54; Troyer, *Charities, Law-Makng, and the Constitution: The Validity of Restrictions on Influencing Legislation*, 31 N.Y.U. INST. ON FED. TAX. 1415, 1456-62 (1973).

[23] It may be misleading to treat First Amendment and equal protection questions as though they were entirely separate, however. In cases such as this, there is a distinct interplay between these two constitutional principles. *See* Emerson, *The Affirmative Side of the First Amendment*, 15 GA. L. REV. 795, 802-03, 819 (1981) (discussing "an equal protection element in the first amendment guarantee" in the context of governmental subsidies for speech). "The peculiar identity of equal protection and first amendment analyses in differential access cases follows logically from the explicit

In *Speiser* v. *Randall*, 357 U.S 513, 518 (1958), the Supreme Court held that discriminatory denial of tax exemptions for engaging in speech can impermissibly infringe First Amendment rights. *Speiser* concerned a California statute that conditioned property tax exemptions on the taking of a loyalty oath. The Court held that even though the statute involved merely the discriminatory denial of tax *exemptions*, and not the direct suppression of speech, a strict level of scrutiny was appropriate. "When we deal with the complex of strands in the web of freedoms which make up free speech, the operation and effect of the method by which speech is sought to be restrained must be subjected to close analysis and critical judgment in the light of the particular circumstances to which it is applied." *Id.* at 520. After conducting this close analysis, the Court concluded that California "clearly has no such compelling interest at stake" as would jusify the operation of the statute. *Id.* at 529.[24]

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constitutional desigination of speech as fundamental and from the fact that the first amendment's proscription against censorship is itself simply a specialized equal protection guarantee." *Perry Local Educators' Ass'n* v. *Hohlt*, 652 F.2d 1286, 1296 (7th Cir. 1981). *See* Kavst, *Equality as a Central Principle in the First Amendment*, 43 U. CHI. L. REV. 20 (1975). The Supreme Court has recognized this interplay many times. *See, e.g., Carey* v. *Brown*, 447 U.S. 455, 460-61, 466-71 (1980); *Tinker* v. *Des Moines Independent Community School District*, 393 U.S. 503, 510-11 (1969) (although classrooms are not public forums, rule prohibiting students from wearing armbands in protest of the Vietnam War struck down in part because school did not prohibit wearing of other symbols of political significance).

[24] Although it could be suggested that *Speiser* should be understood as striking down a statute "frankly aimed at the suppression of dangerous ideas," 357 U.S. at 519, and there-

Although *Speiser* was decided a year earlier than *Cammarano*, nothing in the later case repudiates this ruling. Indeed, Justice Harlan's opinion for the Court in *Cammarano* carefully distinguished the earlier decision:

> *Speiser* has no relevance to the cases before us. Petitioners are not being denied a tax deduction because they engage in constitutionally protected activities, but are simply being required to pay for those activities entirely out of their own pockets, *as everyone else engaging in similar activities is required to do* under the provisions of the Internal Revenue Code. *Nondiscriminatory* denial of deduction from gross income to sums

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fore inapposite here, that interpretation conflicts with the approach taken by the Court. *Speiser* was decided in 1958, soon after the decision in *Dennis* v. *United States*, 341 U.S. 494 (1951). The California statute was an attempt to enforce Article XX, § 19, of the California Constitution, which denied tax exemptions to any "person or organizations which advocates the overthrow of the Government of the United States or the State by force or violence," *see* 357 U.S. at 516. The Court explicitly refused to reach the question of whether "California may deny tax exemptions to persons who engage in the proscribed speech for which they might be fined or imprisoned." *Id.* at 520. Instead, the Court applied strict scrutiny to the "procedural safeguards" and "burden of proof" established by the statute, *id.* at 521, and found that "this allocation of the burden of proof, on an issue concerning freedom of speech, falls short of the requirements of due process." *Id.* at 523. Although it may be correct that an underlying hostility to the California sedition law actually explains *Speiser*, *see Pennsylvania* v. *Nelson*, 350 U.S. 497 (1956), the Court itself was careful to decide the case in light of the strict scrutiny that must be applied to discriminatory tax treatment that implicates *any* First Amendment rights.

> expended to promote or defeat legislation is plainly not " 'aimed at the suppression of dangerous ideas.' " 357 U.S., at 519. Rather, it appears to us to express a determination by Congress that since purchased publicity can influence the fate of legislation which will affect, directly or indirectly, all in the community, *everyone in the community should stand on the same footing* as regards its purchase so far as the Treasury of the United States is concerned.

358 U.S. at 513 (emphasis added). The Court's emphasis on "nondiscriminatory" denial of benefits clearly distinguishes *Cammarano* from this case. *Cammarano* and *Speiser* are therefore consistent in requiring a strict standard of review for situations in which the government grants tax exemptions affecting First Amendment rights on a discriminatory basis.

This court's decisions explicitly adopt this reading of the relationship between *Speiser* and *Cammarano*. In *"Americans United" Inc.* v. *Walters*, 477 F.2d 1169, we held that the appellants' claim that Section 501(c)(3)'s lobbying restriction was unconstitutionally discriminatory raised a substantial constitutional question:

> *Cammarano*, while disposing of appellants' claim that first amendment rights are violated by the questioned statute, does not attempt to deal with possible discriminatory conduct. . . . Americans United, on the other hand, alleges just that discriminatory conduct found lacking in *Cammarano*. . . .
>
> If discrimination exists here it relates to the exercise of the most fundamental of rights, those protected by the first amendment . . . . This is

> neither a frivolous challenge nor one which, as of the writing of this opinion, has been foreclosed by the Supreme Court.

Id. at 1182-83.[25] *See Big Mama Rag, Inc.* v. *United States*, 631 F.2d 1030, 1034 & n.7 (D.C. Cir. 1980); *Haswell* v. *United States*, 500 F.2d 1133, 1147-48 (Ct. Cl. 1974), *cert. denied*, 419 U.S. 1107 (1975). Similarly, in *Community-Service Broadcasting of Mid-America, Inc.* v. *FCC*, 593 F.2d 1102 (D.C. Cir. 1978) (en banc), this court invalidated a requirement that noncommercial educational stations record and maintain copies of broadcasts on issues of public importance because

> where noncontest-based distinctions are drawn in a statute affecting First Amendment rights, the Supreme Court has held that the government interest served must be "substantial" and the statutory classification "narrowly tailored" to serve that interest if the statute is to withstand equal protection scrutiny.

Id. at 1122; *see id.* at 1111.

The case before us arguably differs from *Community Service* and even *Speiser* in the sense that it involves unequal levels of governmental subsidy of First Amendment rights, rather than a more intrusive governmental restriction of those rights. The question apparently remains open whether courts may adopt a different level of scrutiny in cases of

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[25] It should be noted, however, that appellant in *"Americans United"* dropped its First Amendment claims on appeal. *See* 477 F.2d at 1181 ("at oral argument and in its Reply Brief it has narrowed its focus, and we believe wisely so, to the 'discriminatory' aspects of § 501(c)(3)").

this sort, one that is somewhat less searching than the scrutiny applied when the government directly bans First Amendment expression. *See Perry Local Educators' Ass'n* v. *Hohlt*, 652 F.2d 1286, 1296-97 (7th Cir. 1981) (suggesting existence of sliding scale that "may vary with the particular right in question"). It is not necessary to decide whether, in view of the nature of the inhibition of Taxation's First Amendment rights, the appropriate level of review is the most stringent courts employ. It is certainly inadequate simply to ask whether the classifications at issue in this case "bear some rational relationship to a legitimate state end." *McDonald* v. *Board of Election Commissioners*, 394 U.S. 802, 809 (1969). Plainly, this case is not like *Cammarano*, in which the indirect burdens on First Amendment expression fell equally on all. Only a heightened scrutiny test fully accords with decisions in other cases.[26] Indeed,

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[26] Judge Wisdom's comments in *Perry Local Educators' Ass'n* v. *Hohlt*, 652 F.2d 1286 (7th Cir. 1981), which concerned an analogous equal-access claim by a union to use a school board's internal mail system already being used by another union, are instructive:

> Despite the sweeping language of *Mosley* quoted above, other Supreme Court cases demonstrate that it is not invariably true that the government may never discriminate among constitutionally protected speech on the basis of its content or on the basis of the speaker, nor even that all such discrimination must always be scrutinized with equal strictness. Because a majority of the Court were unable to agree on any one rationale in some of these cases, it is not always easy to determine the appropriate standard of review. Even interpreting the cases in the way most favorable to the defendants, however, they require rigorous scrutiny to be applied here. . . . [S]peech restrictions keyed to the identity of the speaker are always scrutinized strictly: they almost invariably

our analysis must be guided by *Buckley* v. *Valeo*, 424 U.S. 1 (1976), in which the Supreme Court heard challenges to public financing provisions for presidential campaigns that provided far greater financial support to major-party candidates. In determining the standard of review appropriate under the Fifth Amendment, the Court started from precedents holding that direct "restrictions on access to the electoral process must survive exacting scrutiny." *Id.* at 94. *See, e.g., Lubin* v. *Panish*, 415 U.S. 709, 718 (1974) (indigent candidates may not be required to pay fil-

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are not neutral with respect to the viewpoints they tend to disfavor.

Id. at 1294-95. *National Black United Fund, Inc.* v. *Devine*, No. 80-2101 (D.C. Cir. Oct. 20, 1981), which rejected a claim that refusal to allow participation in the Combined Federal Campaign by a nonqualifying charity abridged appellant's First Amendment rights, is not to the contrary. The opinion observed that the mere "possibility" that the voices of some charities might be amplified at the expense of others did not "compel strict scrutiny of every Commission decision," slip op. at 12, because the regulations at issue were "intended to serve interests unrelated to the suppression of speech" and were thus subject to evaluation under a different standard. *Id.* at 13. By contrast, the Section 501(c) lobbying restriction clearly was intended to regulate speech. "A rule that substantially impairs the ability of certain groups to convey their message to a desired audience, on the other hand, effectively 'abridges speech' even if it is not intended to curtail public debate. . . . Government must bear a far heavier burden of justification for such a rule. Its content-neutral interests must be compelling' and it must demonstrate the absence of any 'less drastic means' for achieving its purpose." *Id.* In the case now before us, even the government acknowledges that "[t]he democratic process as a whole is jeopardized where the government provides undue support to any one lobbying faction, including the class of charitable organizations." IRS Brief at 29.

ing fees absent alternative means of ballot access); *Williams* v. *Rhodes*, 393 U.S. 23, 31 (1968) (appearance of minor parties on ballot may not be conditioned on whether they can obtain voter petitions with signatures totaling 15 percent of the number of ballots cast in the previous gubernatorial election). These "direct burdens" were much more restrictive than discriminatory funding of presidential candidates, the Court said, thereby implying that less than "exacting scrutiny" was appropriate. *Id.* But it is highly significant that the Court went on to analyze the discriminatory funding provisions in heightened scrutiny terms. "In any event, Congress enacted Subtitle H in furtherance of sufficiently important governmental interests," *id.* at 95, because "public financing as a means of eliminating the improper influence of large private contributions furthers *a significant governmental interest*." *Id.* at 96 (emphasis added). The standard of review we select in this case must be no lower than that applied in *Buckley*, even though neither situation involves a "direct burden" on First Amendment expression.[27]

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[27] *Buckley* is directly analogous to this case because Congress had approved greater public funding of First Amendment activities for some candidates as opposed to others. *Buckley* is also distinguishable, however, in the sense that it involved less restrictive discriminations than those at issue here. The Court noted that correlative restrictions on major-party candidates helped offset the lack of full financing given to minor parties: "But since any major-party candidate accepting public financing of a campaign voluntarily assents to a spending ceiling, other candidates will be able to spend more in relation to the major-party candidates." 424 U.S. at 99. No such offsetting advantages in Section 501 for charitable groups have been suggested here. The Court also observed in *Buckley* that the "risk of harm to minority interests is speculative" because the statute had yet to go into force, *id.* at 101, and cautioned that "we of course do not rule out the

Cf. Citizens Against Rent Control/Coalition for Fair Housing v. *Berkeley*, —— U.S. ——, 50 U.S.L.W. 4071, 4072 (1981) ("regulation of First Amendment rights is always subject to exacting judicial review.").

In short, we must apply a heightened level of scrutiny to the *discriminatory* treatment of lobbying activities given by Section 501(c) to different tax-exempt groups. It may be true that "in taxation, even more than in other fields, legislatures possess the greatest freedom in classification," *Madden* v. *Kentucky*, 309 U.S. 83, 88 (1940), but that power is not unlimited.[28] As the Supreme Court held in *Police*

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possibility of concluding in some future case, upon an appropriate factual demonstration, that the public financing system invidiously discriminates against nonmajor parties." *Id.* at 97 n.131. Again, in contrast, the Section 501(c)(3) restriction on lobbying by charitable organizations has been in effect since 1934.

[28] The government argues that no Supreme Court cases have ever held that classifications in federal tax statutes are to be measured by more than a rational basis standard, IRS Supp. Brief at 30, and that it knows of no Supreme Court cases holding a federal tax statute invalid on equal protection grounds, *id.* at 31. *See San Antonio Independent School Dist.* v. *Rodriguez*, 411 U.S. 1, 41 (1973) (quoting *Madden* v. *Kentucky*); *Lenhausen* v. *Lake Shore Auto Parts Co.*, 410 U.S. 356, 360 (1973) (tax statute must be "palpably arbitrary" or "invidious" to violate equal protection guarantees). These cases do not involve First Amendment claims, however, which must be measured under a more searching standard. *Speiser* v. *Randall*, 357 U.S. at 518.

Federal tax statutes have been overturned, however—by the Supreme Court as well as lower federal courts. *E.g., National Life Ins. Co.* v. *United States*, 277 U.S. 508, 520 (1928) ("The suggestion that as Congress may or may not grant deductions from gross income at pleasure, it can deny to one and give to another is specious, but unsound"); *id.* at 534

Dep't v. *Mosley*, 408 U.S. 92, 99 (1972), there is a profound constitutional distinction between regulating all picketing and doing so selectively. "Because

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(Brandeis, J., dissenting) ("The Court has, of course, power to declare that the system of taxation established by Congress is unconstitutional"); *Moritz* v. *Commissioner*, 469 F.2d 466 (10th Cir. 1972), *cert. denied*, 412 U.S. 906 (1973) (dependent care deduction provision of Code impermissibly distinguished between unmarried male and unmarried female taxpayers); *cf. Golden Rule Church Ass'n*, 41 T.C. 719, 729 (1964) ("Although tax benefits may be matters of legislative grace . . . nevertheless, a denial of such benefits granted to others of essentially the same class may well rise to the level of an unconstitutional discrimination"). Moreover, state tax classifications have been struck down for incompatibility with equal protection principles. *E.g., Iowa-Des Moines National Bank* v. *Bennett*, 284 U.S. 239 (1931); *cf. In re Estate of Legatos*, 1 Cal. App.3d 657, 81 Cal. Rptr. 910 (1969) (equal protection proscribes arbitrary tax classifications). In addition, despite popular conceptions, Social Security is more akin to a tax than an insurance payment. *See Califano* v. *Goldfarb*, 430 U.S. 199, 217-18 (1977) (Stevens, J., concurring in judgment). The Supreme Court, applying an elevated but not its most stringent standard of review, has found certain gender-based classifications in the Social Security Act unconstitutional. See *Weinberger* v. *Wiesenfeld*, 420 U.S. 636 (1975); *Califano* v. *Goldfarb*, *supra*. *See generally* Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law*, 81 HARV. L. REV. 1439, 1461 (1968) ("A minimum demand of uniformly reasonable rules in the management of public largesse is purely an unexceptional requirement of constitutional government").

The government suggests that *Moritz* is a case "of questionable vitality" in light of *Kahn* v. *Shevin*, 416 U.S. 351, 355 (1974), in which the Supreme Court held that Florida could provide a property tax exemption for widows but not for widowers without violating equal protection guarantees. IRS Supp. Brief at 31 n.25. The two cases are clearly distinguishable, however, and even in *Kahn* the statute was upheld after a level of review showing that the differential treatment had

picketing plainly involves expressive conduct within the protection of the First Amendment, . . . discriminations among pickets must be tailored to serve a substantial governmental interest." *See Carey* v. *Brown*, 447 U.S. 455, 471 (1980) (reaffirming *Mosley*); *California* v. *LaRue*, 409 U.S. 109, 138 (1972) (Marshall, J., dissenting). The issue in this case therefore becomes whether the discriminatory framework of Section 501(c) serves a substantial governmental interest and whether the statute is narrowly tailored to serve that end.

"a fair and substantial relation to the object of the legislation." *Id.* at 355 (*quoting Reed* v. *Reed*, 404 U.S. 71, 76 (1971))

It is true that almost three decades ago, this court applied a rational basis test in upholding provisions of the Subversive Activities Control Act that denied tax exemptions or deductibility of contributions to any communist-action organization, regardless of its status under I.R.C. §§ 170 and 501.

> The sanctions with reference to tax exemptions and deductions, which are in Section 11 of the Act, forbid income tax deductions for contributions to a registered organization and deny income tax exemptions to such organizations. These allowances and denials fall within the field of congressional grace so long as a reasonable basis appears. This is too well established to require citation. We think these provisions clearly valid.

Communist Party of the United States v. *Subversive Activities Control Board*, 223 F.2d 531, 557 (D.C. Cir. 1954), *rev'd on other grounds*, 351 U.S. 115 (1956). But this case is of doubtful authority in view of *Speiser* v. *Randall*, which was decided four years later. *Compare Seasongood* v. *Commissioner*, 227 F.2d 907, 911 (6th Cir. 1955) (construing "propaganda" to reach only coloring or distortion of facts with an ulterior motive, and holding that a Good Government League was not disqualified from receiving deductible contributions because a different construction might violate First Amendment).

III. Constitutionality of Differential Tax Treatment of Lobbying

When *Cammarano* v. *United States* was decided in 1959, its foundation was the congressional "neutrality" toward lobbying that existed at the time of the decison. *See* 358 U.S. at 513.[29] Since that time, Congress has departed substantially from the policy that government should not subsidize *any* lobbying. Taxation claims that the refusal to subsidize lobbying Section 501(c)(3) organizations to the same extent that lobbying by other Section 501(c) organizations is subsidized constitutes a violation of equal protection.

On these facts, we agree. In the starkest terms, Congress has used the Code, perhaps inadvertently, to do one of two things. If veterans' organizations and organizations such as Taxation lobby on different sides of the same questions, Congress has chosen to favor one lobbyist on a particular issue over another. If veterans' organizations and Section 501(c)(3) organizations lobby on entirely distinct matters, Congress has ensured that greater attention will be devoted to some causes than others. Either outcome is unconstitutional unless an evaluation of the differential treatment in terms of the heightened level of scrutiny appropriate here demonstrates that there is an important governmental interest justify-

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[29] Indeed, the IRS in *Cammarano* argued against a business deduction for lobbying expenses on the ground that it "would upset the tax equilibrium which existed due to the then existing uniform prohibition against subvention." Garrett, *Federal Tax Limitations on Political Activities of Public Interest and Educational Organizations*, 59 Geo. L.J. 561, 583 & n.38 (1971) (citing Brief for Respondents at 12, *Cammarano* v. *United States*, 358 U.S. 498 (1959)).

ing the First Amendment preference. We turn to that question now.

A. *State Interests Furthered by the Classification*

Before the court can determine whether a substantial governmental interest supports the differential classification under review, it must first determine what interests are said to justify the classifications. Once these interests are identified, it can then be asked whether they are substantial. The pertinent classifications made in the Code are as follows.

1. *Business lobbying*

On rehearing, Taxation has dropped its equal protection challenge to the right of businesses to deduct lobbying expenses, Taxation Supp. Brief at 18 n.3, and it has not hitherto been necessary to explain these provisions of the Code. Nevertheless, the tax treatment of business lobbying is worthy of some attention because the reasons behind that treatment exemplify the sorts of governmental interests that we seek to idenify in this section of the opinion.

I.R.C. § 162(e) permits the deduction of all "ordinary and necessary expenses" incurred in carrying on any trade or business, including lobbying costs incurred in "direct connection" with "legislation or proposed legislation of direct interest to the taxpayer." [30] There is a significant difference between profitmaking and nonprofitmaking entities, and it seems probable that each type lobbies with different

[30] *See* note 9 *supra*. Section 162(e) also permits businesses to deduct indirect lobbying expenditures that are paid as dues to an organization of which the taxpayer is a member, such as a trade association.

motives. *See Haswell* v. *United States*, 500 F.2d at 1150. But the fact that a difference exists does not by itself demonstrate the state interest behind the distinction.

The Senate Report explaining the addition of Section 162(e) in 1962 mentions several policy considerations, however. Lobbying is a cost of doing business, and the deduction of lobbying expenses permits a more accurate measurement of a business' net income. SEN. REP. NO. 1881, 87th Cong., 2d Sess. 22-23 (1962), *reprinted in* [1962] U.S. CODE CONG. & AD. NEWS 3304, 3325. The Report mentions three other explanations: the anomaly of allowing deductions for expenses incurred in presenting a business' viewpoint to administrative agencies and the executive branch but excluding the legislative branch; the importance of some legislation to a business' continued existence;and the desirability of encouraging business people to bring relevant information to the attention of the Congress. *Id.*

2. *Veterans' organizations*

It is far more difficult to identify the governmental interest that is promoted by giving veterans' organizations a lobbying advantage over other Section 501(c) organizations. Just as there are differences between business and nonbusiness groups, of course, veterans groups may be distinguished from other Section 501(c) organizations. As noted above, however, the mere fact that differences exist between any two distinct entities does not demonstrate a substantial state interest that can justify discrimination in the exercise of constitutional rights. Descriptive terms alone have little relevance in identifying the governmental interest furthered by a differential statutory classification.

The government offers only two state interests that are said to justify preferential tax treatment of lobbying by veterans' organizations. First, veterans deserve substantial benefits and rewards in return for their service to the country. These benefits "compensate them for disruption of civilian pursuits," assist in the "readjustment to civilian life," and help "make military service more attractive." IRS Supp. Brief at 44. Second, the government suggests that legislative activity by veterans' organizations is necessary in order to protect veterans' benefits from subversion by hostile forces. "Since these benefits are provided by legislatures, it is reasonable for Congress to allow veterans' organizations to engage in lobbying activities to preserve their benefits without risk of losing their tax deductible contributions." *Id.*

In identifying the government interests furthered by the tax treatment of these groups, however, it must be cautioned that our effort risks becoming a post hoc attempt to rationalize an otherwise inexplicable distinction in the Code. The government made no attempt in the district court to present affidavits or other evidentiary materials. Our identification of the relevant state interests must depend on the legislative history of the statute—but that history is sparse indeed.[31] Despite the apparently un-

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[31] *See, e.g.*, Memorandum in Support of Cross-Motion by Defendants for Summary Judgment, October 28, 1978, at 5 (legislative history is "surprisingly sparse"); Garrett, *supra* note 29, at 564 ("The statutory history of this amendment is unclear as to the underlying rationale and scope of the prohibition"); Troyer, *supra* note 22, at 1421 (legislative history of the 1934 amendment "is sparse and unclear"); Note, *Regulating the Political Activity of Foundations*, 83 HARV. L. REV. 1843, 1845 (1970) ("neither the extent of the proscription nor its rationale has ever been clearly enunciated by Congress").

ambiguous distinction drawn in the statute, there is no indication in the legislative history of these sections that Congress intended to grant any tax-exempt organization a lobbying advantage over any others. In fact, the scant legislative history that exists is to the contrary, and suggests that Congress meant to treat the lobbying of all § 501(c) organizations equally.

Tax exemptions for religious, charitable, and educational organizations—and the correlative provisions permitting taxpayers to deduct their contributions to such groups—are much older than similar treatment of veterans' organizations. Not until after World War One did Congress explicitly extend these benefits to a named veterans' group. Section 214(a) of the Revenue Act of 1921, ch. 136, 42 Stat. 227, accorded exempt status to posts of the American Legion, and it is greatly suggestive that Congress in 1921 viewed the American Legion no differently than any other charitable group. Senator Lodge, who proposed the extension in the Senate, considered it one "to which I think there can be no possible objection," 61 CONG. REC. 7066 (1921), and the lack of debate bears him out. As enacted, the predecessor section to I.R.C. § 170 simply added the American Legion to other organizations, by allowing deductions for

> Contributions or gifts made within the taxable year to or for the use of: (A) The United States, any State, Territory, or any political subdivision thereof, or the District of Columbia, for exclusively public purposes; (B) any corporation, or community chest, fund, or foundation, organized and operated exclusively for religious, charitable, scientific, literary, or educational

> purposes, *including posts of the American Legion or the women's auxiliary units thereof*, or for the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private stockholder or individual; or (C) the special fund for vocational rehabilitation authorized by section 7 of the Vocational Rehabilitation Act.

Section 214(a)(11), 42 Stat. 241 (embphasis added). In the beginning, then, Congress not only expected that veterans' organizations and charitable groups would be treated equally, but it included both groups in the same subsection of the tax laws.

Congress extended this tax treatment to veterans' organizations generally in 1924. Section 214(a)(10), Revenue Act of 1924, ch. 234, 43 Stat. 253. By this time, however, the statute had become considerably more detailed, and Congress created a new subsection for the veterans' groups. Contributions or gifts were deductible if given to

> (A) The United States, any State, Territory, or any political subdivision thereof, or the District of Columbia, for exclusively public purposes; (B) any corporation, or community chest, fund, or foundation, organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes, or for the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private shareholder or individual; (C) the special fund for vocational rehabilitation authorized by section 7 of the Vocational Rehabilitation Act; (D) posts or organizations of war veterans, or auxiliary units or societies of any

> such posts or organizations, if such posts, organizations, units, or societies are organized in the United States or any of its possessions, and if no part of their net earnings inures to the benefit of any private shareholder or individual; or (E) a fraternal society, order, or association, operating under the lodge system, but only if such contributions or gifts are to be used exclusively for religious, charitable, scientific, literary, or educational purposes, or for the prevention of cruelty to children or animals.

Section 214(a)(10), 43 Stat. 271. Again, however, the legislative history creates no inference that Congress sought to treat these groups differently than charitable organizations. The change was approved without comment on the floor in either house, *see* 65 CONG. REC. 2860, 7126 (1924), and received almost no mention in the reports accompanying the revenue act. *See* S. REP. NO. 398, 68th Cong., 1st Sess. 24 (1924); H.R. REP. NO. 844, 68th Cong., 1st Sess. 18 (1924). It is also noteworthy that Congress enacted the same restrictions concerning earnings that inured to the benefit of private individuals for both types of organizations.

The lobbying limitation on charitable organizations was not enacted until 1934, and it is true that Congress inserted it only in the subsection of the statute dealing with charitable organizations. Section 23(o)(2), Revenue Act of 1934, 48 Stat. 690. This may simply have been a drafting oversight, however. Indeed, Senator Harrison, the chairman of the reporting committee, suggested that a more carefully drafted amendment would apply to "war organizations" as well:

> In considering that amendment, as I recall, the sentiment of the committee was that the provision should apply to *any* organization that is receiving contributions, the proceeds of which are to be used for propaganda purposes or to try to influence legislation.
>
> I called the attention of the experts to the fact that it seemed to me the proviso at the end of the second paragraph [the lobbying provision] *should apply to all four paragraphs.* Of course, *that would affect some war organizations,* but personally I see no difference between one organization that might be on one side of the fence getting contributions to propagandize and influence legislation and being permitted to proceed without interference, while at the same time preventing one that might have a different viewpoint from receiving or making use of contributions for the same purpose.

78 CONG. REC. 5861 (1934) (emphasis added). Senator LaFollette, another member of the Senate Finance Committee, agreed to the desirability of uniformity:

> I recognize . . . that there are certain types of organizations to which Congress and the executive branch of the Government might desire to encourage contributions. . . . In my opinion, it will not make a penny's worth of difference, so far as the contributions to these various organizations are concerned, *if they are all excluded from this immunity and all treated alike.* It is my judgment that we never shall get away from mistakes of administration and from decisions which may seem like favoritism until all contributions to organizations of this kind are made subject to the income tax.

Id. at 5959. *See id.* at 5861 (Senator Reed) (stating "no disagreement" with Senator Harrison's remarks). The amendment was eventually agreed to with the understanding that it would undergo redrafting by the conference committee. *See* 78 CONG. REC. 5959 (Senator Couzens) (amendment should "go to conference, and we can change the language if it is found to do any inequity"); *id.* (Senator Reed) ("if the amendment shall be agreed to we will have from now until the conference to study the subject and prepare better phraseology"). There is no explanation in the legislative history for the fact that the language of the enacted version was identical to that of the amendment as proposed.[32]

Congress has not indicated since 1934 that it specifically wishes to impose the lobbying restriction less than uniformly, other than by enacting a Code that articulates lobbying limitations in some provisions and not others. No stated intent to discriminate among the lobbying activities of various tax-exempt organizations is shown by the 1972 addition of Section 501(c)(19), which created a new subsection for veterans' organizations in Section 501 to correspond

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[32] The legislative scheme provides further support for this broad reading of the scope of the 1934 lobbying restriction. when the limitation was enacted, it was added to all relevant portions of the Code—the section establishing an exemption for charitable organizations and the three provisions permitting deduction of charitable contributions for income, estate, and gift tax purposes. See Revenue Act of 1934, Pub. L. No. 73-216, §§ 101(6), 23(o)(2), 406, 517, 48 Stat. 700, 690, 755, 760 (current version at I.R.C. §§ 501(c)(3), 170(c)(2)(D), 2055(a)(2), 2522(a)(2)). There was no intent—and no conceivable reason—to apply the lobbying restriction to some, but not all, of the primary tax benefits accorded exempt organizations.

with the separate veterans' subsection in Section 170. The legislative history suggests that this addition was only a technical, nonsubstantive amendment designed to correct the tax treatment of certain income by veterans' organizations inadvertently changed by the Tax Reform Act of 1969.[33] There is no indication that Congress meant to benefit veterans' organizations vis-a-vis other tax exempt organizations in any respect.[34] Most importantly, in explaining the effect of the new provision the Senate Report noted: "The committee does not intend for any expenditures for

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[33] Until 1972, veterans' organizations were themselves exempt from taxation either as social welfare organizations under Section 501(c)(4) or as social clubs under Section 501(c)(7). Until 1969, organizations exempt under these categories were not subject to the unrelated business income tax. The Tax Reform Act of 1969 extended the unrelated business income tax to these categories, however. The 1972 law therefore created a new subsection for veterans' organizations, and added Section 512(a)(4) so that the income that a veterans' organization received from insuring its members and their dependents was not subject to the unrelated business income tax. *See* S. REP. No. 1082, 92d Cong., 2d Sess. (1972); H.R. REP. No. 851, 92d Cong., 2d Sess. (1972).

[34] The 1969 extension of the unrelated business income tax, for example, had been prompted by a desire "to avoid unequal treatment of the various types of tax-exempt organizations." H.R. REP. No. 413, pt. 1, 91st Cong., 1st Sess. 44 (1969) (amending I.R.C. § 511(a)(2)(A)). The 1972 revision was based on a similar concern. *See* 118 CONG. REC. 6033 (1972) (Rep. Mills) ("the veterans' organizations should not be taxed on this insurance income since other exempt organizations are permitted to insure their members without being taxed on the income from this activity"); *id.* (Rep. Matsunaga) (bill "would place veterans' organizations in exactly the same tax position as fraternal beneficiary associations now enjoy").

lobbying purposes to come under this exception." S. REP. No. 1082, 92d Cong., 2d Sess. 5 (1972), *reprinted in* [1972] U.S. CODE CONG. & AD. NEWS 3141, 3145.[35] It is therefore difficult to resist the conclusion that the tax preferences for lobbying by veterans' organizations reflect no policy, but simple lack of attention and consistency on the part of Congress and the IRS.

3. *Section 501(c)(3) charitable organizations*

In addition to searching for the governmental interests promoted by preferential treatment of lobbying by veterans' organizations, we must also examine the governmental interests behind restrictive treatment of lobbying by charitable groups and other Section 501(c)(3) organizations. As the government emphasizes, Congress, when it does not impinge impermissibly upon fundamental rights, "may address

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[35] The government argues that this language modifies only income received from insurance activities and set aside for charitable purposes under Section 512(a). IRS Supp. Brief at 38 n.33. Even if this reading is correct, great weight should still be given to the restriction. The new rule excluded from the unrelated business income tax all insurance receipts used or set aside for insurance benefits "or for religious, charitable, scientific, literary, educational, etc., purposes" *that were then identified* as "the purposes specified in sec. 170(c)(4)." S. REP. No. 1082, at 5. These purposes, the Report said,

> are to include programs involving Americanism, youth activities, community activities, and information and educational programs relative to national security and foreign affairs for purposes of this provision.

Id. If these "purposes specified in sec. 170(c)(4)" do not include lobbying when income is derived from one source, it is hard to see how they can include lobbying simply because income is derived from a different source.

a problem 'one step at a time.'" IRS Supp. Brief at 40 (quoting *Jefferson* v. *Hackney*, 406 U.S. 535, 546 (1972)). "[T]he Constitution permits Congress to single out the greatest problems and legislate respecting the most serious abuses, while leaving less serious problems to a later date." IRS Supp. Brief at 42. *See Buckley* v. *Valeo*, 424 U.S. at 105; *Katzenbach* v. *Morgan*, 384 U.S. 641, 657 (1966). If the legislative history demonstrates a compelling reason for Congress to focus with particularity on special problems created by charitable lobbying with tax-deductible dollars, this might suffice to justify the differential treatment indicated in the Code sections before us.

Initially, it does seem far easier to discern the governmental interests promoted by the lobbying restriction on charitable organizations than those advanced by not extending this restriction to veterans' groups. Federal tax exemptions for religious, charitable, and educational organizations are as old as the Income Tax Act of 1894,[36] but there were no statutory limitations on the lobbying activities of exempt organizations for the next forty years. As described above, Congress amended the tax laws in 1934 to make clear that what are now Section 501(c)(3) organizations were not to engage in substantial lobbying activities. Unlike the legislation concerning veterans' organizations, the lobbying restriction was

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[36] Act of August 27, 1894, ch. 349, 28 Stat. 509 (held unconstitutional in *Pollock* v. *Farmers' Loan & Trust Co.*, 158 U.S. 601 (1895)). A similar exemption provision was included in the Income Tax Act of 1913, ch. 16, 38 Stat. 114, and subsequent revenue acts. The correlative provision permitting taxpayers to deduct contributions from their income taxes was enacted in 1917. War Revenue Act, ch. 63, 40 Stat. 297, 330 (now I.R.C. § 170).

enacted only after a number of explanatory remarks by members of Congress, and this makes it seem relatively easy to identify the governmental interests promoted by the measure.

In discussing the amendment on the floor of the Senate, for example, Senator Harrison explained:

> the attention of the Senate committee was called to the fact that there are certain organizations which are receiving contributions in order to influence legislation and carry on propaganda. The committee thought there ought to be an amendment which would stop that, so that is why we have put this amendment in the bill.

78 CONG. REC. 5959 (1934). Senator Reed, who was also a member of the reporting committee, addressed

> what we were trying to do by this amendment. There is no reason in the world why a contribution made to the National Economy League should be deductible as if it were a charitable contribution if it is a selfish one made to advance the personal interests of the giver of the money . . . .

Id. at 5861. These statements suggest that Congress acted to curb what is regarded as abuses by Section 501(c)(3) organizations then eligible to use tax-deductible contributions for lobbying activities. Based partly on these comments, the district court below articulated three "legitimate governmental purposes" served by the lobbying restriction: "assurance of governmental neutrality with respect to the lobbying activities of charitable organizations; prevention of abuse of charitable lobbying by private interests; and preservation of a balance between the lobbying activities of charitable organizations and those of non-

charitable organizations and individuals." Memorandum Order, J.A. 62.

It would be grossly simplistic to read too much into these comments, however. Legislation is never passed in a vacuum, and any genuine understanding of its purpose must make some account of what conditions were before it was enacted. There is an early history of restrictions on political activity by charitable organizations well preceding the 1934 statutory change. In 1919, for example, the Treasury provided by regulation that "associations formed to disseminate controversial or partisan propaganda are not educational within the meaning of the statute." Treas. Reg. 45, art. 517 (1919), in T.D. 2831, 21 TREAS. DECS. INT. REV. 285 (1920). The principle was successfully applied in several cases before the Board of Tax Appeals in the 1920s,[37] and was central to Judge Learned Hand's opinion in *Slee* v. *Commissioner*, 42 F.2d 184 (2d Cir. 1930):

> Political agitation as such is outside the statute, however innocent the aim, though it adds nothing

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[37] *See, e.g., Herbert E. Fales*, 9 B.T.A. 828 (1927) (evidence indicated that Scientific Temperance Federation, Massachusetts Anti-Saloon League, Massachusetts Anti-Cigarette League, and International Reform Bureau were formed to disseminate controversial propaganda); *Sophia G. Coxe*, 5 B.T.A. 261 (1926) (League to Enforce Peace not exclusively charitable). *See generally Jackson* v. *Phillips*, 96 Mass. (14 Allen) 539 (1867) (trust to promote "women's rights" not charitable); *Bowditch* v. *Attorney General*, 241 Mass. 168, 134 N.E. 796 (1922) (trust for promotion of temperance held charitable). The later case of *Slee* v. *Commissioner*, 42 F.2d 184 (2d Cir. 1930), was widely followed. *E.g., James J. Forstall*, 29 B.T.A. 428, 436 (1933); *Leubuscher* v. *Commissioner*, 54 F.2d 998, 1000 (2d Cir. 1932); *Weyl* v. *Commissioner*, 48 F.2d 811, 812 (2d Cir. 1931).

> to dub it "propaganda," a polemical word used to decry the publicity of the other side. Controversies of that sort must be conducted without public subvention; the Treasury stands aside from them.

Id. at 185. Obviously, because of the close connection in the statute between veterans' organizations and other charitable groups, the regulations and judicial pronouncements presumably applied to veterans' organizations too.

These restrictions on political activity by charitable organizations prior to 1934 make it difficult to interpret the congressional intent behind the 1934 amendment with total confidence. "In view of the existing case law on the subject, it is not clear what the proponents of the legislation sought to accomplish." Clark, *The Limitation on Political Activities: A Discordant Note in the Law of Charities*, 46 VA. L. REV. 439, 447 (1960). The addition to the statute may have been meant simply to codify preexisting regulation of charitable organizations. To a great extent, however, commentators hold the view that the 1934 enactment was a reform measure intended to liberalize the case law.[38] It appears that the proponents

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[38] *See, e.g., Seasongood* v. *Commissioner*, 227 F.2d 907, 910 (6th Cir. 1955) (courts "have also applied the principle, that the section being remedial must be liberally construed"); Clark, *supra* note 12, at 447; Borod, *supra* note 22, at 1113 (1934 amendments "were intended to some extent to liberalize, rather than restrict, the administration of the revenue laws in regard to charitable organizations"); Caplin & Timbie, *supra* note 6, at 185 ("A persuasive case can be made" that "Congress intended a more limited proscription than a literal reading of the statute would suggest"). The restriction has been widely excoriated. *E.g.*, Note, *The Tax Code's Differential Treatment of Lobbying Under Section 501(c)(3)*, 66

wanted to restrict selfishly motivated political agitation, meant to secure some personal interests of the donor, without providing that all political activity by charitable organizations was inherently improper. The breadth of the lobbying restriction has therefore been attributed primarily to the inability of Congress to draft a more "appropriate" test.[39] This theory finds support in the debates. Senator Reed, who was also a member of the Senate Finance Committee, observed on the floor that "we found great difficulty in phrasing the amendment. I do not reproach the draftsmen. I think we gave them an impossible task; but this amendment goes much further than the committee intended to go." 78 CONG. REC. 5861 (1934).

Whatever the strength of these views, they strongly suggest that the 1934 amendment applying only to charitable organizations cannot automatically be presumed to show that Congress addressed only "the phase of the problem which seem[ed] most acute to the legislative mind." *Williamson* v. *Lee Optical Co.*, 348 U.S. 483, 489 (1955). If the 1934 amendment was intended to liberalize the case law, the fact that it applied only to charitable organizations would suggest that Congress meant to treat lobbying by such groups *less* stringently than similar activity by

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VA. L. REV. 1513, 1525 (1980); Note, *Political Activity and Tax Exempt Organizations Before and After the Tax Reform Act of 1969*, 38 GEO. WASH. L. REV. 114, 1136 (1970) (restriction is "obscure in origin, uncertain in application, and perhaps harmfully outmoded").

[39] Garrett, *supra* note 29, at 564; *see* Clark, *supra* note 12, at 447.

other groups.[40] The legislative history provides no positive assurance for this proposition, of course, but it also fails utterly to demonstrate that Congress restricted the lobbying of charitable organizations because of special problems arising in that area alone.

B. *Substantiality of the State Interests*

If there are any other governmental interests furthered by disparate tax treatment of lobbying activities by tax-exempt organizations and other groups, they have not been identified in the legislative history or by the parties in this case. The question now becomes whether any of these interests are sufficiently substantial to justify the differential tax treatment, and if so whether the statute is narrowly tailored to meet them.

The preceding discussion clearly identified governmental interests that justify allowing businesses to deduct the cost of business lobbying. Because the government assesses taxes on net business income, such deductions are necessary in order to permit accurate measurement of the cost of producing goods and services. In contrast, tax-exempt organizations have no comparable need for a realistic reflection of income. The governmental interest in distinguishing between these two kinds of organizations is a substantial one,

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[40] Some additional support for this argument may lie in the enactment of Section 501(h) in 1976, *see* note 6 *supra*, which liberalized the rules governing lobbying by charitable organizations by freeing them from the uncertain application of the "substantiality" test. *See Hearings on Legislative Activity by Certain Types of Exempt Organizations Before the House Comm. on Ways and Means.* 92d Cong., 2d Sess. 1 (1972); Geske, *Direct Lobbying Activities of Public Charities*, 26 TAX LAWYER 305 (1972).

and the Code's differentiation between businesses and Section 501(c)(3) organizations is both relevant to that interest and narrowly tailored to serve it.[41]

The addition of Section 162(e) has import in assessing the strength of the government's analysis in this case, however, because it demonstrates that lobbying is not an inherently improper activity concerning which Congress seeks as much neutrality as possible. Section 162(e) unquestionably demonstrates a decision by Congress to depart from the posture of neutrality toward lobbying that once was affirmed by *Cammarano*.[42] It therefore undercuts any sugges-

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[41] The same reasoning supports the deductibility of contributions to unions and business leagues under Sections 501(c)(5) and 501(c)(6). As noted above, such contributions are deductible only to the extent they are "business expenses" under Section 162. *See* note 9 *supra*.

It may be noted in passing, however, that some of the governmental concerns articulated in the reports accompanying the enactment of Section 162(e) are of doubtful constitutional validity. Neither the importance of some legislation to a business' existence nor the desirability of encouraging business people to bring relevant information to the attention of Congress offers a clear and substantial justification for subsidizing lobbying by particular groups over others. *See* S. REP. No. 1881 at 22-23, [1962] U.S. CODE CONG. & AD. NEWS at 3325.

[42] *See, e.g.*, Garrett, *supra* note 29, at 583 ("By reversing the Supreme Court, the 1962 amendment to section 162(e) indicates a changed congressional position on subvention, makes defense of the policy difficult since it is no longer uniformly applied, and raises serious first amendment issues regarding whether the restrictions applied to section 501(c)(3) and 170(c)(2) organizations operate discriminatorily to suppress constitutional freedoms"); *Influencing Legislation by Public Charities: Hearings Before the House Comm.*

tion that because efforts to influence legislation present "well-recognized dangers to representative Government," *Haswell* v. *United States*, 500 F.2d at 1150, such efforts should never be subsidized through tax deductions.[43] The first of the three governmental interests given by the district court for the restriction on lobbying by charitable organizations—the preservation of governmental neutrality concerning lobbying—therefore disappears.

The second such interest, prevention of abuse of charitable lobbying by private interests, also fails to pass constitutional muster under a close scrutiny test. There is no evidence whatsoever that the lobbying of veterans is less subject to abuse by private

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on Ways and Means, 94th Cong., 2d Sess. 68 (1974) (ABA statement):

> [N]ow that direct business lobbying has become a deductible activity under § 162(e), the former "neutral posture of the tax law with respect to lobbying" (see Cammarano v. United States, *supra*) has been upset in favor of the business interests as opposed to the charitable organizations.

The reports accompanying section 162(e) also suggest that federal policy is not neutral, but is one of encouraging business participation in the legislative process. S. REP. No. 1881 at 23, [1962] U.S. CODE CONG. & AD. NEWS at 3325.

[43] The Supreme Court has recognized that departures from uniform pursuit of an asserted governmental purpose raise doubts as to whether that purpose is genuinely important. *See, e.g., Metromedia, Inc.* v. *San Diego*, —— U.S. ——, ——, 49 U.S.L.W. 4925, 4933 (1981) ("exceptions to the general prohibition are of great significance in assessing the strength of the city's interest"); *Schad* v. *Borough of Mount Ephraim*, —— U.S. at ——, 49 U.S.L.W. at 4600 n.14 ("The Borough's decision to permit live entertainment as a nonconforming use only undermines the Borough's contention that live entertainment poses inherent problems that justify its exclusion").

interests than that of other Section 501(c) groups. Thus, although this interest is doubtless valid, it cannot be suggested that Section 501(c) has been tailored to meet it. We decline the government's invitation to infer that because Congress did not apply the lobbying exemption to all exempt organizations, it saw no problem in according special tax benefits to veterans' organizations despite their lobbying activities. The legislative history discussed above provides no support for such an inference.

The final interest said to require special treatment of lobbying by charitable organizations—"preservation of a balance between the lobbying activities of charitable organizations" and those of other groups—also fails to meet the heightened standard applicable here. There is absolutely no evidence that Congress sought to achieve this objective when it enacted the lobbying restriction in 1934. Even if charities before that time could lobby with deductible contributions, there is no indication that charities had become so powerful that they threatened to drown out the voices of those whose lobbying was not similarly subsidized.[44]

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[44] Members of this court have suggested that in First Amendment cases, judges should consider only the actual governmental purposes behind challenged legislation rather than possible or hypothetical ones. *See, e.g., Community-Service Broadcasting of Mid-America, Inc.* v. *FCC*, 593 F.2d at 1128 (Robinson, J., concurring in part) ("courts cannot rely upon aims that apparently never crossed the minds of the legislators, particularly when confronted by the possibility of danger to a fundamental interest") (footnote omitted); *id.* at 1146 & n.51 (Leventhal, J., concurring) ("Courts engaged in the careful scrutiny of legislation . . . are not free to conjecture an important governmental interest when one has not surfaced in congressional deliberations."). *Cf. Califano* v. *Goldfarb*, 430 U.S. 199, 212-17 (1977) (plurality opinion) (ex-

Moreover, had this been the intent of Congress, courts would consider such a purpose constitutionally illegitimate. "[W]here, as here, the legislature's suppression of speech suggests an attempt to give one side of a debatable public question an advantage in expressing its views to the people, the First Amendment is plainly offended." *First National Bank of Boston* v. *Bellotti*, 435 U.S. 765, 785-86 (1978); *see id.* at 790-91. "[T]he concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment." *Buckley* v. *Valeo*, 424 U.S. at 48-49. The governmental purposes said to require special restrictions on lobbying by Section 501(c)(3) organizations are therefore either illegitimate, insubstantial, or inadequately promoted by a statute that is not narrowly tailored to serve them.

Moreover, the Code's discriminatory treatment of lobbying by veterans' organizations does not even satisfy the test of rationality, much less the heightened level of scrutiny appropriate here. The legislative history of the tax exemptions accorded veterans demonstrates absolutely no governmental interest whatsoever that is served by allowing such groups to conduct substantial lobbying with tax-deductible contributions. The post hoc rationales suggested by the government are constitutionally illegitimate. Allowing veterans to lobby freely in order to protect their benefit programs does not explain why other groups that may be equally dependent upon Congress

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amining legislative history of challenged statute to determine "actual purpose" of discrimination, and refusing to accept objectives advanced by appellants because Congress had given no attention to them).

for support should have less access to the legislature. Other tax-exempt groups, such as universities, are equally beset by hostile forces but are nevertheless limited by Section 501(c)(3) in the amount of lobbying they may do to maintain or increase their level of congressional funding. Finally, it emphatically does not follow that because veterans deserve special benefits in recognition of their service to the country, they are entitled to greater First Amendment rights than other citizens. The First Amendment proscribes governmental efforts to favor one speaker over another. *See, e.g., Carey* v. *Brown*, 447 U.S. at 462-63; *First National Bank of Boston* v. *Bellotti*, 435 U.S. at 784-85; *Police Dep't* v. *Mosley*, 408 U.S. at 96. "First Amendment rights may not be used as a type of 'currency' to reward those who have rendered service to the nation or who are otherwise determined to be worthy." Taxation Supp. Brief at 19.

In short, the Code's classification according tax benefits to lobbying by some tax-exempt groups but not others does not withstand constitutional scrutiny. No identifiable governmental interests justify the differential tax treatment of lobbying by veterans' groups and Section 501(c)(3) organizations. The distinctions and interests suggested by the government are either completely unrelated to any substantial purpose, or reflect only illegitimate governmental goals. "[I]t has been open to courts since the enactment of the Fourteenth Amendment to determine, if on the particular facts they must, that a discrimination reflects *no* policy, but simply arbitrary and capricious action." *Baker* v. *Carr*, 369 U.S. 186, 226 (1962) (emphasis by the Court).

C. *The Unconstitutionality of These Classifications*

Because no substantial purpose justifies the disparate treatment of lobbying by Section 501(c) when that statute is subjected to careful scrutiny, the discriminatory treatment of Taxation's First Amendment activities constitutes a denial of equal protection, and is unconstitutional. Even so, this remains a troublesome case. Congress has enormous leeway in classifying the recipients of its benefits and funds, and in favoring certain groups over others.[45] If Congress provided office space and government surplus furniture to veterans' organizations, for example, as Congress clearly has authority to do, it would indirectly facilitate the lobbying of such groups by freeing up funds that other organizations such as Taxation would have to spend for rent and supplies. Moreover, Congress occasionally appropriates grants for certain groups with the understanding that the money may be used for public education, litigation, and lobbying.[46] Similarly, in other contexts such as National Public Radio and Television, the government directly funds First Amendment activity that by

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[45] Article I, Section 8 of the Constitution empowers Congress to lay and collect taxes and expend public funds for the general welfare. Its powers under this clause are broad. *See Steward Machine Co.* v. *Davis*, 301 U.S. 548 (1937).

[46] *See, e.g.*, 42 U.S.C. § 2996f(a)(5) (1980) (Legal Services Corporation prohibited to use funds to influence passage or defeat of federal or state legislation except in delineated circumstances); 42 U.S.C. § 5653 (1980) (National Institute for Juvenile Justice and Delinquency Prevention authorized to prepare studies and recommendations and disseminate information to individuals, agencies, and organizations concerned with prevention and treatment of juvenile delinquency).

necessity excludes some speakers and favors others. *See* Emerson, *The Affirmative Side of the First Amendment*, 15 GA. L. REV. 795, 823-28 (1981); Note, *Freeing Public Broadcasting from Unconstitutional Restraints*, 89 YALE L.J. 719 (1980) (arguing that direct state subsidy of the Public Broadcasting Service violates the First Amendment).

We suggest nothing concerning the constitutionality of any of these grants and programs, which of course are not before us. Nevertheless, it may be observed that certain principles do distinguish many of these programs from the lobbying preference now given to veterans. First, it is well established that although government may not directly facilitate the speech of one person over that of another, government too is a rightful participant in the "marketplace of ideas."[47] Examples, such as the Voice of America and the press

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[47] *See, e.g., Greer* v. *Spock*, 424 U.S. 828, 838 n.10 (1976); *Toward a Gayer Bicentennial Committee* v. *Rhode Island Bicentennial Foundation*, 417 F. Supp. 632, 638-39 & n.9 (D.R.I. 1976) (state can inquire whether applicants proposed use of public area comports with theme specified by government). The government also possesses editorial powers when it acts as the proprietor of an entity with press rights. *See Avins* v. *Rutgers, State Univ. of New Jersey*, 385 F.2d 151 (3d Cir. 1967), *cert. denied*, 390 U.S. 920 (1968) (state university law review had editorial prerogative of rejecting article). It may be difficult, of course, to distinguish between government-sponsored speech and private speech in close cases. *Compare Bonner-Lyons* v. *School Committee*, 480 F.2d 442 (1st Cir. 1973) *with Buckel* v. *Prentice*, 572 F.2d 141 (6th Cir. 1978). *See generally Perry Local Educators' Ass'n* v. *Hohlt*, 652 F.2d 1286, 1292-96 (7th Cir. 1981); Emerson, *supra* note 25, at 831, 837; Shiffrin, *Government Speech*, 27 U.C.L.A. L. REV. 565, 577-88 (1980); Yudof, *When Governments Speak: Toward a Theory of Government Expression and the First Amendment*, 57 TEX. L. REV. 863, 908-12 (1979).

offices of executive departments and agencies illustrate the government's authority to communicate with its citizens and the people of the world. Under some conditions, it is possible that the government could also subsidize private groups or speakers in an effort to get its own message across. *Compare Community-Service Broadcasting of Mid-America, Inc.* v. *FCC*, 593 F.2d at 1110 n.17, *with* Shiffrin, *Government Speech*, 27 U.C.L.A. L.REV. 565 (1980). Second, the very nature of government may dictate that it alone can provide certain forums for First Amendment expression, from parks with rostrums to a national public television system. First Amendment principles apply to these forums, of course, but they require that access be nondiscriminatory [48]

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[48] *See, e.g., Police Department* v. *Mosley*, 408 U.S. 92 (1972); *Healy* v. *James*, 408 U.S. 169 (1972); *Cox* v. *Louisiana*, 379 U.S. 536 (1965); *Hague* v. *CIO*, 307 U.S. 496 (1939). Similar principles govern the time, place, and manner restraints that may be applied to First Amendment expression without violating the Constitution. *See, e.g., Grayned* v. *City of Rockford*, 408 U.S. 104, 116 (1972) ("The crucial question is whether the manner of expression is basically incompatible with the normal activity of a particular place at a particular time"); *Kovacs* v. *Cooper*, 336 U.S. 77 (1949) (loudspeakers); *Cox* v. *New Hampshire*, 312 U.S. 569 (1941) (parades).

In certain situations, the fact that government has created the forum seems to permit some discrimination among speakers that is directed toward content but neutral with regard to viewpoint. *See, e.g., FCC* v. *Pacifica Foundation*, 438 U.S. 726 (1978) (FCC can regulate use of certain words on airwaves); *Lehman* v. *City of Shaker Heights*, 418 U.S. 298 (1974) (plurality opinion) (municipal bus system can permit commercial but not political advertising). *Compare Southeastern Promotions, Ltd.* v. *Conrad*, 420 U.S. 546 (1975) (granting claim for access to municipal theatre by promotor of controversial production) *with Young* v. *American Mini*

rather than that government not create the facilities at all. Finally, it is possible that a thorough constitutional analysis of certain programs might well demonstrate that although the government program *does* discriminatorily subsidize certain speakers, the state interest is sufficiently compelling that the discrimination is not unconstitutional. Until other programs that arguably subsidize First Amendment rights in a discriminatory fashion come before us, however, it would be injudicious to undertake any elaborate constitutional analysis of what might now seem analogous situations.

What does remain crucially important, however, is that none of these possible justifications can uphold discriminatory tax treatment of lobbying by different kinds of Section 501(c) organizations. There is a brightline distinction between direct legislative promotion of speech, and indirectly facilitating speech by providing an organization with other kinds of support. It cannot conceivably be argued that the lobbying preference for veterans' organizations demonstrates the government's attempt to get its own message across to the public, because the Code pro-

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Theatres, Inc., 427 U.S. 50 (1976) (plurality opinion) (upholding restrictive zoning ordinance for theatres exhibiting sexually explicit films). *See generally* Karst, *Public Enterprise and the Public Forum*, 37 OHIO ST. L.J. 247 (1976); Comment, *Access to State-Owned Communications Media—the Public Forum Doctrine*, 26 U.C.L.A. L.REV. 1410 (1979); Note, *The Public Forum: Minimum Access, Equal Access, and the First Amendment*, 28 STAN. L.REV. 117 (1975). Other standards may be appropriate where the "forum" is not public at all. *See United States Postal Service* v. *Council of Greenburgh Civic Ass'ns*, —— U.S. ——, 49 U.S.L.W. 4813 (1981) (upholding statute prohibiting deposit of unstamped "mailable" matter in officially approved mailboxes).

vides open-ended subsidization of any position that these groups choose to espouse even if those positions directly challenge the policy of the government."[49] Without passing judgment on the constitutionality of congressional attempts to advance the message of Congress itself by funding the speech of particular groups, it is clear that Congress cannot write favored organizations a blank check payable on the First Amendment.

IV. The Constitutional Remedy

Section 501(c)'s disparate treatment of lobbying by particular tax-exempt groups leads to an unconstitutional violation of equal protection principles.

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[49] As noted earlier, *see* note 11 *supra*, veterans' organizations have not restricted their lobbying to issues of particular importance to veterans, such as veterans' benefit programs. A particularly notable example is the lobbying of many veterans' organizations against the proposed Panama Canal treaties. *See, e.g., Panama Canal Treaties: Hearings Before the Senate Comm. on Foreign Relations*, 95th Cong., 1st Sess. 566 (1977) (statement of Robert Charles Smith, National Commander, American Legion); *id.* at 578 (statement of Frank D. Ruggiero, National Commander, Amvets); *id.* at 582 (statement of Maj. Gen. J. Milnor Roberts, U.S. Army Reserve, executive director, Reserve Officers Ass'n.); *id.* at 595 (statement of Col. Phelps Jones, USA-Ret., director national security and foreign affairs, VFW); *Proposed Panama Canal Treaties, Hearings Before the House Comm. on International Relations*, 95th Cong., 1st & 2d Sess. 155 (1977-1978) (statement of Dr. John Wasylik, National Commander in Chief, VFW); *id.* at 163 (statement of William J. Rogers, immediate past national commander, American Legion); *id.* at 171 (statement of Frank D. Ruggiero, National Commander, Amvets); *id.* at 175 (statement of Dr. Robert P. Foster, chairman national foreign relations commission, American Legion); *id.* at 177 (statement of Col. Phelps Jones, director national security and foreign affairs, VFW).

The final question before us is the appropriate relief. The most obvious remedy—striking down the Section 501(c)(3) lobbying limitation that now governs Taxation—poses the most obvious problems. The legislative history of that limitation clearly shows a congressional determination that the public interest requires regulating the amount of tax-deductible dollars flowing to Section 501(c)(3) organizations that may be used for lobbying purposes. Extending the lobbying treatment now given to veterans' organizations to all Section 501(c)(3) groups might open a Pandora's Box of woes and abuse. The government notes, for example, that during the 1980 fiscal year, there were 319,842 organizations listed as exempt under Section 501(c)(3), but only 22,247 veterans' groups.[80] In 1978, contributions, grants, and gifts to Section 501(c)(3) organizations aggregated more than $21.9 billion, nearly 1500 times the $16.7 million given to veterans' organizations.[81] If we permitted Section 501(c)(3) groups to lobby as freely as veterans' organizations, there would be a clear risk of abuse by private interests and an increase in the amount of "selfish" contributions "made to advance the personal interests of the giver of the money." 78 CONG. REC. 5861 (Senator Reed). Even when they attempt to

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[80] IRS Supp. Brief at 40 (citing IRS Exempt Organizations Master File, 1980 IRS ANN. REP. 76). The government cautions that this does not represent a true universe of Section 501(c)(3) organizations, however, because certain organizations such as churches need not apply for recognition unless they desire a rule, and because the ruling letter covers not only the applying organization but all of its subordinate units.

[81] *Id.* (based on 90 percent of all information returns filed by such organizations for the 1978 taxable year).

remedy constitutional violations, courts must resist ordering relief that clearly exceeds the legitimate expectations of Congress.[52]

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[52] Taxation also implies the existence of a considerably narrower remedy. It claims that the most repugnant feature of the current lobbying limitation in Section 501(c)(3) is that organizations that engage in "substantial lobbying" lose their right to receive *any* tax-deductible contributions and not just those contributions used specifically for lobbying. In his concurring opinion in *Cammarano* v. *United States*, for example, Justice Douglas suggested that the statute in question would have been found invalid had it denied *all* deductions to an organization that spent money to promote or oppose an initiative, rather than simply denying deduction of the money spent in that effort. 358 U.S. at 515. Taxation therefore suggests that an analogous remedy in this case would be to deny tax-deductibility only in an amount proportionate to the amount of lobbying in which a Section 501(c)(3) organization engaged. *Cf. Harris* v. *McRae*, 448 U.S. 297, 317 n.19 (1980), which held that a "broad disqualification from receipt of public benefits" may be unconstitutional even when a more limited exclusion is permissible. In that case, the Court held that although Congress might decline to subsidize certain medically necessary abortions, a "substantial constitutional question would arise if Congress had attempted to withhold all Medicaid benefits from an otherwise eligible candidate simply because that candidate had exercised her constitutionally protected freedom to terminate her pregnancy by abortion." *Id.* Taxation argues that precisely the same disproportionate penalty is imposed by Section 501(c)(3) when an organization exercises First Amendment rights fully, and urges that the Constitution requires at the very least that its contributors' deductions be limited only to the extent of the amounts actually spent on lobbying by a Section 501(c)(3) organization.

Taxation's argument is not without merit, but we decline to grant the alternative remedy for the same reason discussed above. Each of the several hundred thousand Section 501(c)(3) organizations now monitored by the IRS may

A second remedy is also possible in this case. As the Supreme Court has recognized, in certain situations benefits may be taken away from a preferred group in order to cure unconstitutionally unequal treatment, even if that group is not before the court. *See, e.g., Welsh* v. *United States*, 398 U.S. 333, 361-65 (1970) (Harlan, J., concurring in result); *Skinner* v. *Oklahoma ex rel. Williamson*, 316 U.S. 535, 543 (1942). "The right invoked is that to equal treatment; and such treatment will be attained if either their competitors' taxes are increased or their own reduced." *Iowa-Des Moines National Bank* v. *Bennett*, 284 U.S. 239, 247 (1931). *Cf. Kirk* v. *Commissioner*, 425 F.2d 492, 495 (D.C. Cir.), *cert. denied*, 400 U.S. 853 (1970) (refusing to reach constitutionality of income exclusion for ministers because even if the statute violated the Establishment Clause, "it would not affect the tax liability in this case. Rather ministers of the gospel would then no longer be entitled to the benefits of the exclusion."). Although a number of cases involving equal protection challenges to underinclusive federal benefit stat-

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have hundreds of thousands of separate contributors. For each organization, the IRS would have to ascertain the proportion of lobbying activities to other expenses of the organization, and then trace that percentage through to the individual contributions in order to limit the amount of their deductibility to the same proportion. In a less complex world, this logical scheme might be appropriate, although it would not cure the equal protection violation found here. But this remedy could easily overload and destroy any IRS capacity for monitoring these organizations and become an administrative nightmare subject to widespread disregard or abuse. Although mandating such a remedy is within the authority of Congress, this court should not impose a massive new workload on the IRS that leads to so partial a cure of the discrimination shown here.

utes suggest that "extension, rather than nullification, is the proper course," *Califano* v. *Westcott*, 443 U.S. 76, 89 (1979), "[i]n choosing between these alternatives, a court should attempt to accommodate as fully as possible the policies and judgments expressed in the statutory scheme as a whole." *Id.* at 94 (Powell, J., dissenting). It seems evident that the legislative judgments expressed in Section 501(c) will be less disturbed by striking down the preferential treatment now accorded the lobbying of veterans' organizations than by extending that treatment to Section 501(c)(3) organizations. The legislative history, suggesting that the current treatment of veterans may have been inadvertent but demonstrating a clear congressional concern to prevent abuse of charitable lobbying by private interests, fully confirms this view.

This remedy appears the most logical and most in accordance with the judgments expressed by Congress. But the veterans' organizations that would be directly affected by nullification of preferential treatment in Section 501(c) have not heretofore been parties to this litigation. Courts must always be cautious when dealing with the interests of those who have not had an opportunity to present their own arguments and defenses, partly because judicial legitimacy stems in large measure from hearing the views of all those who are directly involved. *See* Fiss, *The Supreme Court, 1978 Term—Foreword: The Forms of Justice*, 93 HARV. L. REV. 1, 44-46 (1979). It is less significant, though still noteworthy, that Taxation also opposes this solution to the unconstitutionality of Section 501(c).[53] We therefore decline to adopt this remedy at this time.

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[53] Taxation Supp. Brief at 20 n.4. In *Iowa-Des Moines Bank* v. *Bennett*, 284 U.S. at 247, the Court ordered a refund of

Accordingly, this case is remanded to the district court with the instruction that it cure the constitutionally invalid operation of Section 501(c) after inviting veterans' organizations to participate in framing the relief. In the interim, of course, the IRS may seek other remedies. It may decide that additional regulations governing lobbying by veterans' organizations—and more diligent enforcement of the lobbying regulations that already govern those organizations—are in fact in accordance with the congressional purpose behind Section 501(c).[54] The IRS and veterans' groups might also seek from Congress a clearer determination of the purposes, if any, that Congress had in mind when it enacted legislation giving preferential tax treatment to lobbying by veterans, or passage of more narrow legislation that could show that veterans' groups actually speak for Congress in advocating specific kinds of veterans' programs and benefits. On the record before us, however, it is not even clear that Section 501(c)'s unequal application reflects any congressional intent whatsoever. The broad tax support provided to veterans' organizations for lobbying on any side of any issue they choose, and the companion restriction in lobbying by charitable groups and other Section 501

"the excess of taxes exacted" from appellants because "it is well settled that a taxpayer who has been subjected to discriminatory taxation through the favoring of others in violation of federal law, cannot be required himself to assume the burden of seeking an increase of the taxes which the others should have paid."

[54] The IRS presumably came to analogous conclusions concerning the treatment of lobbying by fraternal beneficiary societies, despite the apparent silence of the Code on that question. *See* pp. 10-11 *supra*.

(c)(3) organizations, creates an unconstitutional disparity. Exactly how this problem should be cured is not a matter that should be decided initially by this appellate court, especially when all directly affected parties are not before us.

Conclusion

The First Amendment occupies a preferred place in our scheme of government. *Thomas* v. *Collins*, 323 U.S. 516, 530 (1945). This does not mean, however, that its application in a legal dispute is always simple. The lines will seem clearer when Congress directly prohibits a particular group from speaking in a particular place, and more confused when Congress subsidizes First Amendment expression unevenly through the itricacies of the Internal Revenue Code. Nevertheless, the principle remains the same. Because the Code differentiates in its treatment of protected First Amendment activity by various tax-exempt organizations, the constitutionality of its classifications must be judged by a heightened level of scrutiny.

When viewed in that light, there can be no question that the suggested distinctions between Taxation and preferred tax-exempt organizations are constitutionally meaningless. Discrimination in government subsidization of First Amendment rights must be narrowly tailored to meet a substantial state purpose, and the proffered distinctions between the favored groups and Section 501(c)(3) organizations are either unrelated to any governmental interest whatsoever or are illegitimate bases for governmental classification. Indeed, although it has not been necessary to reach the question, it is possible that these discriminations could not even be upheld under a

test asking whether they were "rationally related to a legitimate governmental purpose," for the discrimination may have been nothing more than an accidental or inadvertent result of legislative drafting.

Tax discrimination against the lobbying of Taxation and similar tax-exempt organizations therefore fails to meet the constitutional standard appropriate here. We reverse and remand this case with instructions that the unequal treatment be cured, either by restricting the tax benefits accorded veterans' organizations or by extending those benefits to Section 501(c)(3) organizations. Even in the arcane intricacies of the tax code, the government cannot give special voice nor lend special ear to any person or group no matter how worthy their ideas or their credentials. The exacting standards of the First Amendment do not allow the government to provide a preferred place for certain parties—at least not without a more substantial state purpose than has been shown here.

Reversed and remanded

MACKINNON, *Circuit Judge* (dissenting). Appellant Taxation with Representation of Washington (Taxation) is incorporated as a nonprofit charitable and educational organization whose purpose is to represent the general public on tax issues before Congress, the courts, and the executive branch. After its incorporation in June 1977, Taxation applied to the Internal Revenue Service (IRS) for a declaration that it was an organization described in § 501 (c)(3) of the Internal Revenue Code (Code), 26 U.S.C. § 501(c)(3). Although Taxation may otherwise have qualified for section 501(c)(3) status,[1] the IRS determined that Taxation intended to devote a substantial part of its activities to "attempt[s] to

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[1] Section 501(c)(3) applies to:

> Corporations, and any community chest, fund, or foundation, organized and operated exclusively for religious, *charitable*, scientific, testing for public safety, literary, or *educational* purposes . . . no part of the net earnings of which inures to the benefit of any private shareholder or individual, *no substantial part of the activities of which is carrying on propaganda, or otherwise attempting, to influence legislation* (except as otherwise provided in subsection (h)), and which does not participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of any candiate for public office.

(emphasis added). Such organizations are exempt from taxation under the income tax subtitle unless such exemption is denied under I.R.C. §§ 502, 503, or 504, sections with which we are not concerned in this appeal. Wholly apart from the issues raised by the lobbying restriction, it could be seriously questioned how an organization the avowed purpose of which is the lobbying of Congress has a 'religious, charitable, scientific, testing for public safety, literary or educational purpose' that brings it within § 501(c)(3) in the first instance.

influence legislation" by lobbying Congress on matters involving the federal tax system. The effect of that determination, the correctness of which Taxation does not contest, was to deprive it of several tax advantages, including exemption from certain taxes on its own activities[2] and the eligibility to receive tax deductible contributions.[3] (These advan-

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[2] Tax benefits accruing to a § 501(c)(3) organization include: exemption from income tax by virtue of § 501(a); exemption from § 3111(a)'s federal social security (FICA) taxes by virtue of § 3121(a), (b)(8)(B); and exemption from § 3301's federal unemployment (FUTA) taxes by virtue of § 3306(b), (c)(8).

[3] I.R.C. § 170 provides for the deduction of contributions from income tax:

> (a) *Allowance of deduction.*—
>
> (1) General rule.—There shall be allowed as a deduction any charitable contribution (as defined in subsection (c)) payment of which it made within the taxable year. . . .
>
> (c) *Charitable contribution defined.*—For purposes of this section, the term "charitable contribution" means a contribution or gift to or for the use of—
>
> . . . .
>
> (2) A corporation, trust, or community chest, fund, or foundation—
>
> (A) created or organized in the United States or any possession thereof, or under the law of the United States, any State, the District of Columbia, or any possession of the United States;
>
> (B) organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes, or to foster national or international amateur sports competition (but only if no part of its activities involve the provision

tages are referred to collectively herein as the "tax benefits" accruing to organizations qualifying under section 501(c)(3).) Taxation may still qualify for tax exemption on its own income as a social welfare organization under I.R.C. section 501(c)(4).[4] That

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> of athletic facilities or equipment), or for the prevention of cruelty to children or animals;
>
> (C) no part of the net earnings of which inures to the benefit of any private shareholder or individual; and
>
> (D) *Which is not disqualified for tax exemption under section 501(c)(3) by reason of attempting to influence legislation,* and which does not participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of any candidate for public office. [Emphasis added.]

Similar language permits donors to make analogous deductions with respect to the gift tax, I.R.C. § 2522(a)(2) (citizens or residents) & (b)(2) (nonresident aliens), and the estate tax, I.R.C. §§ 2055(a)(3) (citizens or residents) & 2106(a)(2)(A)(ii) (nonresident aliens).

In addition, foundations may be deterred from contributing to an organization that fails the lobbying test for section 501(c)(3) status because otherwise untaxed foundations and their managers are subject to tax if the foundation pays any amount "to carry on propaganda, or otherwise to attempt, to influence legislation." I.R.C. § 4945(a), (d)(1).

[4] Section 501(c)(4) applies to:

> Civic leagues or organizations not organized for profit but operated exclusively for the promotion of social welfare, or local associations of employees, the membership of which is limited to the employees of a designated person or persons in a particular municipality, and the net earnings of which are devoted exclusively to charitable, educational, or recreational purposes.

Taxation is the product of a merger between two organizations, one (Taxation with Representation Fund) a § 501(c)

subsection, however, while placing no restrictions on an organization's lobbying activities, does not result in donors being permitted to *deduct contributions* from their own income, gift and estate taxes.[5]

After exhausting its administrative remedies, Taxation brought a declaratory judgment action against the Commissioner of Internal Revenue under 26 U.S.C. § 7428 (1976),[6] seeking a declaration that section 501(c)(3)'s restriction of substantial attempts to influence legislation is unconstitutional. The district court granted the Commissioner's motion for summary judgment, *Taxation with Representation of Washington* v. *Blumenthal*, 43 A.F.T.R. 2d (P-H) ¶ 79-419 (1979), and on appeal, a divided panel of this court affirmed. *Taxation with Representation* v. *Blumenthal*, No. 79-1464 (D.C. Cir. April 14, 1981). On June 11, 1981, this court voted to hear the case *en banc*, which under our rules vacates the panel opinions. The court's order stated that the hearing *en banc* would focus upon two issues: (1) the standard of review applicable to the challenged statutory scheme, and (2) the ultimate

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(3) group devoted to courtroom advocacy, and the other (Taxation with Representation) a § 501(c)(4) group devoted to legislative advocacy. *See* J.A. at 16.

[5] Taxation could also seek to qualify under I.R.C. § 501(h), which permits some § 501(c)(3) organizations to devote specified quantities of their exempt purpose expenditures to lobbying, rather than adhere to the less certain "substantiality" test of § 501(c)(3). In the district court, however, Taxation expressly disavowed any intention to make an election under § 501(h). J.A. at 15-16. *See* discussion at 22-24 *infra*.

[6] Section 7428 authorizes certain courts to issue declaratory judgments in certain cases relating to the status and classification of organizations under 26 U.S.C. § 501(c)(3).

constitutionality of the Code's distinction between fraternal and veterans' organizations on the one hand and section 501(c)(3) exempt organizations on the other.[7]

I.

A case raising the same issue presented here was decided against one of Taxation's predecessor organizations[8] by the Fourth Circuit in *Taxation with Representation* v. *United States*, 585 F.2d 1219 (4th Cir. 1978), *cert. denied*, 441 U.S. 905 (1979). The district court in this case followed that decision in disposing of Taxation's contentions. 43 A.F.T.R.2d (P-H) ¶ 79-419 at 79-681. For the reasons set forth in the margin, I find the present suit not barred by the doctrine of res judicata, and therefore address the merits.[9]

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[7] Taxation also originally challenged the validity of permitting businesses to deduct their lobbying expenses as "ordinary & necessary" business expenses. *See* I.R.C. § 162(e). That contention was not pursued before the court *en banc*, and we do not reach its merits here.

[8] *See* note 4 *supra*.

[9] Taxation's papers in the district court made clear that it absorbed the functions of the taxpayer organization that lost in *Taxation with Representation*. *See* J.A. at 16-18. The record before the district court also establishes that Taxation has the same chief executive as had Taxation with Representation, the appellant in the Fourth Circuit case, *compare id.* at 14 *with id.* at 16, and employs the same attorney, *compare id.* at 6 *with* 585 F.2d at 1220. Despite this close relationship between issues and parties, the Government has not pleaded or argued that Taxation should be precluded, as a matter of res judicata or collateral estoppel, from litigating the issues the Fourth Circuit decided against Taxation with Representation.

Although collateral estoppel and res judicata are waivable affirmative defenses under Fed. R. Civ. P. 8(c), some courts

Taxation challenges the Tax Code's denial of tax benefits to otherwise qualified organizations which engage in substantial lobbying on what it views as

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have addressed the preclusion issue *sua sponte* where information within their notice has effectively relieved the defendant of his usual burden of proof on the issue. *E.g.*, Boone v. Kurtz, 617 F.2d 435, 436 (5th Cir. 1980) ("[E]ven though Fed. R. Civ. P. 8(c) denominates res judicata as an affirmative defense[,] [d]ismissal by the court *sua sponte* on *res judicata* grounds . . . is permissible in the interest of judicial economy where both actions were brought before the same court"); Gullo v. Veterans Coop. Housing Ass'n, 269 F.2d 517, 517 (D.C. Cir. 1959) (trial court may apply res judicata upon taking notice of parties' previous case); Wilson v. United States, 166 F.2d 527, 528-29 (8th Cir. 1948) (appellate court on own motion may determine action is barred by res judicata); Holmes v. United States, 231 F. Supp. 971, 972-73 (N.D. Ga. 1964), *aff'd*, 353 F.2d 785 (5th Cir. 1965) (court, apparently on own motion, took judicial notice of prior proceedings and applies res judicata on defendants' motion for summary judgment). *Accord, cases cited in* United States v. Sioux Nation, 448 U.S. 371, 432 (1980) (Rehnquist, J., dissenting). *See also* Southern P. R.R. v. United States, 168 U.S. 1, 55-61 (former judgment held conclusive even though estoppel not specially pleaded).

The rationale for *sua sponte* action on questions of preclusion is that relitigation should be precluded not simply to serve defendant's interest in avoiding litigation, but also to avoid judicial waste and to foster reliance on judicial decisions. Wilson v. United States, *supra*, 166 F.2d at 528-29; *see generally* Montana v. United States, 440 U.S. 147, 153-54 (1979) *and authorities cited*. The defendant's consent to relitigation cannot always be decisive, for there is an independent public interest "in preventing the misallocation of judicial resources and second guessing prior panels of Art. III judges when the issue has been fully and fairly litigated in a prior proceeding." United States v. Sioux Nation, *supra*, 448 U.S. at 433 (Rehnquist, J., dissenting).

We are thus tempted to determine whether Taxation should be estopped to litigate the same issues on which Taxation

two independent grounds. First, it asserts that section 501(c)(3), by conditioning tax benefits on the non-exercise of an organization's rights of speech, press, and petition, violates the first amendment. This attack does not rely on any distinctions drawn by the Code among organizations, but rather proceeds from the premise that the lobbying restriction is invalid, regardless of the uniformity of its application, as a burden on protected speech. *See* Taxation Br. at 15. Second, Taxation argues that the Code, by placing restrictions on the lobbying activities of section 501(c)(3) organizations while placing no similar restrictions of those of veterans' organizations defined in section 501(c)(19) or fraternal orders defined in sections 501(c)(8) and (10), denies it the equal protection of the laws guaranteed by the fifth amendment's due process clause.[10]

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with Representation lost in the 4th Circuit. However, the Government's failure to plead preclusion at any stage of this litigation deprived Taxation of an opportunity to argue that such defense should not apply, and it is not clear that Taxation has no arguable objection to such application. We thus have a choice of remanding for a hearing on that issue, *see, e.g.*, Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation, 402 U.S. 313 (1971) (remanding to permit defendant to plead collateral estoppel and plaintiff to challenge the plea), or of disposing of Taxation's case on the merits. The original panel determined that judicial economy would be best served by taking the latter course, and so proceeded to the substantive issues, as we have determined to do here.

[10] "[I]f a classification would be invalid under the Equal Protection Clause of the Fourteenth Amendment, it is also inconsistent with the due process requirement of the Fifth Amendment." Johnson v. Robison, 415 U.S. 361, 364 n.4 (1974). *See* Buckley v. Valeo, 424 U.S. 1, 93 (1976).

II.

Taxation's first claim is based on the contention that the statutory denial of tax benefits to organizations that engage in substantial lobbying places an "unconstitutional condition" upon the enjoyment of those benefits.[11] The cornerstone of this argument is *Speiser* v. *Randall*, 357 U.S. 513 (1958), in which the opinion of Justice Harlan for the Court established the proposition that the enjoyment of a government-conferred benefit cannot be made contingent upon compliance with a condition that violates the first amendment rights of one who would otherwise qualify for the benefit.[12] Taxation urges that the lobbying restriction in section 501(c)(3) imposes precisely such a condition. This contention, as the majority recognizes, is without merit.

Taxation does not claim that the challenged provisions "chill" its speech by imposing a *direct* restriction or penalty upon its lobbying activities. Nor,

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[11] We consider primarily the denial of tax exemption for Taxation's own income, but note that there is no serious question as to Taxation's standing to challenge conditions upon the deductibility of donors' contributions to it. It is our understanding that in doing so, Taxation is asserting its *own* rights, and not the rights of third party potential donors not before the court.

[12] *Speiser* invalidated a requirement that persons seeking to qualify for a state constitutional property tax exemption for veterans sign a loyalty oath. The Court held that the requirement improperly created a presumption of disloyalty on the part of applicants the burden of overcoming which impermissibly chilled the applicants' exercise of their speech rights. "The man who knows that he must bring forth proof and persuade another of the lawfulness of his conduct necessarily must steer far wider of the unlawful zone than if the state must bear these burdens." 357 U.S. at 526.

moreover, does it claim that the effectiveness of its presumed "charitable and educational" activities—in fact, lobbying of Congress—is diminished by the bare fact, without more, of its non-exempt status. Taxation's claim is confined to the assertion that because it does not qualify as an exempt organization under section 501(c)(3), it is rendered significantly less able to raise funds in support of its activity.[18] Even if government has no obligation to support its activities either directly or through the tax structure, Taxation argues, the decision to provide or withhold such support cannot permissibly turn upon whether or not it exercises its first amendment right to lobby.

The condition placed upon Taxation plainly has its *direct* effect not upon speech, but upon fundraising. This fact does not, however, render the protections of the first amendment inapplicable, for it is well established that "the Constitution's protection is not limited to direct interference with fundamental rights." *Healy* v. *James*, 408 U.S. 169, 183 (1972). "Even where a challenged regulation restricts freedom of expression only incidentally," the first amendment demands heightened judicial sensitivity. *Schad* v. *Borough of Mount Ephraim*, 101 S. Ct. 2176, 2183 n.7 (1981). *See also Buckley* v. *Valeo*, 424 U.S. 1, 21 (1976); *Bates* v. *City of Little Rock*, 361 U.S. 516, 523 (1960). The question whether the condition placed upon exempt status by section 501(c)(3) violates any right guaranteed Taxation by the first amendment therefore deserves thorough examination.

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[18] As the Supreme Court has noted, many contributors "simply will not make donations to an organization that does not appear" on the Cumulative List of exempt organizations published by the IRS. Bob Jones University v. Simon, 416 U.S. 725, 729-30 (1974).

I agree that lobbying is an activity generally protected by the first amendment. I also agree for the purposes of this case that Taxation possesses in general the same rights of speech and petition guaranteed other persons. *See First National Bank* v. *Bellotti*, 435 U.S. 765 (1978). But in my view, under the specific circumstances of this case, Congress could constitutionally condition the availability of tax benefits upon an agreement not to engage in substantial lobbying. In this instance, the reach of Taxation's right to lobby can be determined only in the context in which that right is asserted.[14] By holding itself out as a charitable or educational organization and laying claim to the tax benefits accorded such organizations, Taxation has assumed a status which Congress may constitutionally regard as incompatible to some extent with the carrying on of substantial political activities, and which may therefore be made subject to conditions upon its enjoyment that would otherwise be impermissible.

In first amendment cases, the threshold question of the level of scrutiny applicable to the challenged provision turns upon whether the alleged restriction is one based upon the "content" of the communication sought to be protected. Where speech is restricted because of its content rather than because of its incidental effects on governmental interests the

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[14] As Taxation conceded in its brief before the original panel in this case, "in establishing a benefit program, the Government may include requirements that are necessary to assure that the objects of the program are attained." Taxation Br. filed 8/1/79 at 14 n.5. *See* Buckley v. Valeo, 424 U.S. 1, 57 n.65 (1976); Community-Service Broadcasting of Mid-America, Inc. v. FCC, 593 F.2d 1102, 1129 (D.C. Cir. 1978) (en banc); Note, *Unconstitutional Conditions*, 73 HARV. L. REV. 1595, 1600 (1960).

Constitution demands strict judicial scrutiny. Satisfaction of that standard requires the government to demonstrate "that its regulation is necessary to serve a compelling interest and that it is narrowly drawn to achieve that end." *Widmar* v. *Vincent*, 102 S. Ct. 269, 274 (1981). In contrast, where a restriction, though trenching on speech, is directed not at the content of the speech, but at the "nonspeech" elements of the restricted activity, government bears the considerably lighter burden of showing that the restriction furthers an "important or substantial governmental interest" and is "no greater than is essential to the furtherance of that interest." *United States* v. *O'Brien*, 391 U.S. 367, 377 (1968). *See Consolidated Edison Co.* v. *Public Service Commission*, 447 U.S. 530, 540 n.9 (1980).

For the reasons set forth below, I review the lobbying restriction in section 501(c)(3) as one unrelated to the content of protected speech. I have no difficulty in finding that the governmental interest expressed by the restriction is a substantial one, and that the means Congress has chosen to protect that interest are sufficiently narrow to satisfy the Constitution. Consequently, in my opinion Taxation's argument that the lobbying restriction in section 501(c)(3) is an "unconstitutional condition" upon the enjoyment of the tax benefits Taxation seeks to finance its substantial lobbying should be rejected.

A.

Taxation argues that the lobbying restriction is one "based on the type of speech or the subject matter" of protected expression, and therefore merits strict scrutiny. Taxation Br. at 15. However, the argument plainly fails when one compares section 501(c)

(3) with the types of statutes invalidated by the Supreme Court as "content-based" restrictions on speech. Section 501(c)(3) is not a restriction based on content. It is not aimed at the "message" or "communicative impact" of Taxation's activities, but rather at confining tax-supported organizations to those activities Congress deems worthy of encouraging by public support through the tax system. The restriction is directed neither toward controlling what Taxation's audience may hear, nor toward controlling Taxation's message because of its viewpoint or subject matter. It simply regulates the activities of an entity which happens to be, *inter alia*, a speaker, and is imposed for reasons wholly unrelated to the message Taxation seeks to convey.[15] The fact that the statute in terms specifically restricts activities a "substantial part" of which is "carrying on propaganda, or otherwise attempting to influence legislation" cannot support the inference that the provision is one aimed at any particular subjects or viewpoints.

The Supreme Court's decisions invalidating content-based restrictions on speech demonstrate that strict first amendment scrutiny is reserved for those instances in which the government has sought specifically to "dictat[e] the subjects about which persons may speak and the speakers who may address a public issue." *First National Bank* v. *Bellotti*, 435 U.S. 765, 785 (1978). The application of this high standard is appropriate "[e]specially where . . . the legislature's suppression of free speech suggests an attempt to give one side of a debatable public question an advantage in expressing its views . . . ." *Id.*

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[15] *See generally* Redish, *The Content Distinction in First Amendment Analysis*, 34 STAN. L. REV. 113, 114-18 (1981).

Even where the motive of Congress in enacting a restriction bearing on speech has been claimed to be non-neutral with respect to content, *see United States* v. *O'Brien*, *supra*, the Court has refused to apply strict scrutiny. It has confined application of that test to cases in which the government's asserted interest is *directly related to* the *content* of the restricted communication. *See, e.g.*, *Widmar* v. *Vincent*, *supra*, 102 S. Ct. 269 (1981) (invalidating, on free speech grounds, state university rules that generally permitted use of campus facilities but denied use for religious purposes); *Metromedia, Inc.* v. *San Diego*, 101 S. Ct. 2882 (1981) (invalidating ordinance that permitted commercial expression while prohibiting noncommercial expression in identical circumstances); *Central Hudson Gas & Electric Co.* v. *Public Service Commission*, 447 U.S. 557 (1980) (invalidating regulation that prohibited utility from promoting use of electricity); *Consolidated Edison Corporation* v. *Public Service Commission*, 447 U.S. 530 (1980) (invalidating regulation that prohibited utility from expressing views on "controversial issues of public policy"); *Carey* v. *Brown*, 447 U.S. 455 (1980) (invalidating ordinance that permitted labor picketing while prohibiting other picketing); *Police Department* v. *Mosley*, 408 U.S. 92 (1972) (same).[16]

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[16] We focus on cases relating to content restrictions based upon *subject matter* because they involve the Court's broadest reading of the term "content." In cases involving the invalidation of restrictions based on the *particular viewpoint* of a speaker on a given subject, the distinction between such restrictions and § 501(c)(3) is even plainer. *See, e.g.*, First Nat'l Bank v. Bellotti, 435 U.S. 765 (1978) (invalidating statute which limited corporate speech to protection of corporations' business interests).

Where neither discrimination among viewpoints nor among subjects of discussion is involved, the concerns prompting strict scrutiny are absent. The lobbying restriction imposed in section 501(c)(3) does not "dictat[e] the *subjects* about which persons may speak and who may address *a* [*given*] *public issue*," and certainly does not "suggest[] an attempt to give *one side* of a debatable public question an advantage in expressing its views . . ." *First National Bank* v. *Bellotti*, *supra*, 435 U.S. at 785 (emphasis added). The statute merely reflects Congress' determination that groups claiming exemption from the normal obligations imposed by the tax laws must devote the resources thereby gained to the purposes for which Congress granted the exemption in the first place.[17]

The restriction imposed by § 501(c)(3) is not rendered invalid merely because it requires organiza-

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[17] This is not the type of legislative directive to "stick to business" invalidated in *First National Bank* v. *Bellotti*, *supra*, 435 U.S. at 785 ("If a legislature may direct business corporations to 'stick to business,' it may also limit other corporations —religious, charitable or civic—to their respective 'business' when addressing the public."). The statute struck down in that case limited corporate speech on referendum issues to instances in which the corporation's interests were presumed (by the statute itself) to be affected. Section 501(c)(3) does not operate in any way to restrict the subjects upon which Taxation may lawfully speak, nor does it condition Taxation's receipt of tax benefits upon the subjects it addresses. *The lobbying restriction is entirely neutral with respect to the subject matter of the legislation sought to be influenced.* Section 501(c)(3) merely requires charitable and educational organizations to spend the fruits of their special tax status in ways that Congress finds to be consistent with the purposes for which that status was created, *i.e.*, to further charitable and educational purposes. *See* discussion at 15-17 *infra*.

tions enjoying exempt status to confine themselves to largely non-political activities. The ordinance invalidated in *Village of Schaumburg* v. *Citizens for a Better Environment*, 444 U.S. 620 (1980), somewhat similarly restricted the activities of charitable groups by requiring that they spend at least 75 percent of their receipts directly for "charitable purposes." A principal difference between that restriction and the one involved here is that the Schaumburg ordinance burdened an activity (solicitation of funds door-to-door) "characteristically intertwined" with speech. A second significant difference, however, is that the restriction in *Schaumburg* was defended primarily as one that sought to prevent fraud upon donors.[18] Section 501(c)(3) has an entirely different purpose. Here, the government has conferred tax benefits on the organization seeking taxpayer support in order to encourage particular kinds of activity in the public interest, and has imposed the lobbying restriction as a means to insure that that benefit is issued *directly* to further the purposes Congress sought to encourage in granting the benefit.[19]

B.

The foregoing establishes that this case does not concern a *content*-based restriction on speech. It remains to decide whether the lobbying restriction satisfies the lower standard of first amendment review imposed by *United States* v. *O'Brien*, *supra*, 391 U.S.

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[18] The other asserted governmental interest was protection of residents' privacy from the intrusions of door-to-door solicitors, 444 U.S. at 638-39.

[19] The nature of the governmental interest expressed by the lobbying restriction is more fully discussed at 15-17.

367 (1968).[20] That standard is, as stated above, whether the law in question serves an "important or substantial governmental interest" whose "incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest." *Id.* at 377. It is my conclusion that section 501(c)(3) satisfies both concerns.

1. *Governmental Interest*

Taxation argues that there is no clear statement in the legislative history of section 501(c)(3) of the purpose Congress sought to achieve in imposing the lobbying restriction as a condition on the employment of tax benefits, and claims that the statute is therefore supported only by "*post hoc* and speculative arguments of Government counsel, which are constitutionally insufficient." Taxation Br. at 16. I disagree. The interests of Congress sought to further are clear, and clearly suffice to justify the statute.

Where legislative intent is manifest in the words or obvious effect of a statute itself, the absence of comment thereon in the hearings, reports, or floor debates of Congress is not to be taken as evidence that the statute is devoid of rational purpose. *See Boys Markets, Inc.* v. *Retail Clerks Union, Local 770*, 398 U.S. 235, 241 (1970). So-called "*post hoc*" arguments are permissible to interpret and support congressional enactments. Congress is not an administrative agency that is required to state the grounds upon which it acts, and courts do not interfere with the powers of Congress when exercising their judicial power to interpret federal statutes. *Cf.*

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[20] The Supreme Court recently reaffirmed the appropriateness of the *O'Brien* standard in cases not involving content-based restrictions. Consolidated Edison Co. v. Public Svc. Comm'n, 447 U.S. 530, 540 n.9 (1980).

Securities and Exchange Commission v. *Chenery Corporation*, 332 U.S. 194, 196 (1947); *id.*, 318 U.S. 80, 95 (1943). It is not necessary in its legislative record for Congress to explain every provision of every statute and foresee every argument that may be asserted in support of or against its enactments. This is as true in the first amendment context as it is elsewhere. *See, e.g., Buckley* v. *Valeo*, 424 U.S. 1, 106 (1976). Although the fact is often forgotten, statutes can often be interpreted by reference to their plain terms without reference to extraneous sources. This is such a statute. Read in the context of the plain purpose of section 501—to benefit certain groups performing various services that Congress views as being in the public interest[21]—subsection (c)(3) clearly indicates a congressional intent to encourage certain activities viewed as charitable and educational.

The lobbying restriction, since it cannot successfully be attacked on the ground that it discriminates among organizations based upon the content of their speech, can only sensibly be read as an attempt to confine such groups to purposes that are directly charitable or philanthropic. As Judge Wilkey has stated, the lobbying restriction in section 501(c)(3) *"is aimed at assuring some purity in that purpose."* [22]

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[21] A survey of the various exemptions stated in § 501(c) will reveal the general types of interests Congress sought to protect. *See* I.R.C. § 501(c)(1)-(22).

[22] "Americans United," Inc. v. Walters, 477 F.2d 1169, 1183 (D.C. Cir. 1973) (concurring opinion), *rev'd on jurisdictional grounds sub nom.* Alexander v. "Americans United" Inc., 416 U.S. 752 (1974) (emphasis in original). *See also* Bob Jones University v. Simon, 416 U.S. 725, 772 & n.8 (1974) (Blackmun, J., dissenting); Haswell v. United States, 500 F.2d 1133, 1150 (Ct. Cl. 1974).

Similarly, a committee report interpreting the provision shortly after its original enactment stated:

> The exemption . . . is based upon the theory that the Government is compensated for the loss of revenue by its relief from financial burden which would otherwise have to be met by appropriations from other public funds . . .

H.R. Rep. No. 1860, 75th Cong., 3d Sess. 19 (1938). Congress could reasonably conclude that limiting the lobbying activities of educational and charitable organizations was a proper means of ensuring that the benefits these organizations produce will be received by the intended beneficiaries.

Although it is unnecessary, in the absence of evidence indicating a contrary intention, to seek further justification in the legislative history for the lobbying restriction, it merits noting that contrary to Taxation's claims, there is a strong indication of Congress' intent in imposing that regulation. The floor debate on amendments to the Revenue Act of 1934, in which section 501(c)(3) (section 23(o) of the 1934 Act) has its origin, contains discussion the significance of which cannot be obscured by its brevity.

In a colloquy between Senator Reed of Pennsylvania and Senator Harrison, the concern was raised that the language restricting propaganda and attempts to influence legislation—the precise language found in the statute today—would have the effect of denying exempt status to organizations such as "the Society for the Prevention of Cruelty to Children, or the Society for the Prevention of Cruelty to Animals, or any of the worthy institutions that we do not in the slightest mean to effect." 78 Cong. Rec. 5861 (1934) (remark of Sen. Reed). Although

he specifically noted and endorsed this desire on the part of Congress to protect the activities of such philanthropic groups, Senator Reed voiced the position of the Senate Finance Committee that "[t]here is no reason in the world why a contribution . . . should be deductible as if it were a charitable contribution *if it is a selfish one* made to advance the personal interests of the giver of the money. *That is what the committee was trying to reach . . .*" *Id.* (emphasis added).[38] Despite the fact that Senator Reed personally favored a narrower restriction, Congress, having before it the above interpretation by a leading member of the committee charged with responsibility for tax matters, adopted the language presently found in section 501(c)(3). Even if the statutory language were thought to leave substantial doubt about the purpose sought to be achieved by the lobbying restriction, this revealing history resolves any question about the intent of Congress in adopting it.

Thus interpreted, it is beyond question that the lobbying restriction serves an "important and substantial" interest of the United States. The encouragement of charity, education, and similar objectives through the tax system, like that achieved by direct congressional appropriations for such purposes, is an interest whose legitimacy cannot seriously be doubted. The interests served by the activities of the organizations enumerated in section 501(c)(3)

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[38] The majority suggests that "it would be grossly simplistic" to attribute much significance to this exchange. Majority op. at 44. Since I take the view that this evidence only confirms the intent obvious from the face of the statute, extended discussion of the proper weight to be accorded it is unnecessary.

are well within both the power of Congress to serve the public interest and the traditional scope of the exercise of that power.

2. *The Scope of the Restriction*

Taxation's final argument against section 501(c)(3) is that, even conceding the government to have an important and substantial interest that is served by the restriction, the restriction is invalid because it is broader "than is essential to the furtherance of that interest." *United States* v. *O'Brien*, *supra*, 391 U.S. at 377. Even where a restriction on speech is not directed at content, the first amendment imposes the requirement that government adopt the means of achieving its purpose that is least restrictive of first amendment interests. *Village of Schaumburg* v. *Citizens for a Better Environment*, 444 U.S. 620, 636 (1980).

Taxation's argument is based upon the fact that *all* tax benefits emanating from section 501(c)(3) are denied to any organization a "substantial part of the activities of which" is lobbying. This, Taxation alleges, renders the restriction broader than necessary to achieve Congress' purpose, in that if Congress sought only to deny tax benefits to organizations engaged in "selfish" activity, and so to deny deductibility to their contributors, the achievement of that end requires only that *that portion* of contributions *actually used* for the prohibited "selfish" purposes be treated as nonexempt and non-deductible. The remainder of the funds, used for purposes not expressly forbidden, would continue to qualify for exemption and deductibility.

The accuracy with which government defines categories of citizens with the purposes of regulation is

a matter of particular importance when first amendment interests are at stake. *Central Hudson Gas & Electric Corp.* v. *Public Service Commission*, 447 U.S. 557 (1980). Courts in such circumstances are not relieved, however, of their duty to respect the superior competence and concomitant authority of the legislature in devising means of regulation. As was held in *Buckley* v. *Valeo*, 424 U.S. 1, 30 (1976), "Congress' failure to engage in such fine tuning does not invalidate" legislation, even where the legislation in question burdens first amendment freedoms of speech and association. *See also id.* at 83, 103.[24] It has long been recognized that this deference to legislative competence is particularly appropriate where the regulation involved is a system of taxation. *San Antonio Independent School District* v. *Rodriguez*, 411 U.S. 1, 41 (1973); *Madden* v. *Kentucky*, 309 U.S. 83, 88 (1940).

I reach the same conclusion as the majority and view the Code as a whole as a scheme of regulation that is sufficiently narrow to satisfy first amendment concerns. In my opinion, the recent enactment of section 501(h) of the Code provides an insight into Congress' choice of means in regulating charities

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[24] Judges and commentators have frequently noted the dangers inherent in judicial attempts to refine regulatory schemes, even where undertaken in order to enforce compliance with the first amendment. *See, e.g.*, Central Hudson Gas & Electric Corp. v. Public Service Comm'n, *supra*, 447 U.S. at 599-606 (1980) (Rehnquist, J., dissenting); Cox, *The Supreme Court, 1979 Term—Foreword: Freedom of Expression in the Burger Court*, 94 HARV. L. REV. 1, 35 (1980) (questioning the "close judicial analysis of policy alternatives [in *Central Hudson*], with the burden put upon the state to foresee and negate all the alternatives that the Court can imagine . . .").

that compels the conclusion that section 501(c)(3) is valid.[25]

Before proceeding to a discussion of the terms of section 501(h) and their relationship to section 501(c)(3), it is important to note the significance of that relationship. Section 501(h) is the product of an extensive effort by Congress to establish precise limits on the political activity of charitable organizations.[26] In effect, *section 501(h) constitutes*

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[25] The parties did not focus on the significance of § 501(h) in their arguments before this court. Taxation's ability and willingness to elect coverage under § 501(h), *see* discussion at 22-24 *infra*, need not be considered, however for we rely on that section not simply as affording Taxation a less restrictive alternative in fact, but also as a source of guidance in evaluating the existing scope of § 501(c)(3).

[26] At least as early as 1972, Congress held hearings on the problems posed by § 501(c)(3)'s lobbying restriction. *See* Legislative Activity by Certain Types of Exempt Organizations: Hearings Before the House Comm. on Ways and Means, 92d Cong., 2d Sess. (1972). Several bills were introduced in earlier sessions on the subject prior to the ultimate adoption of section 501(h) by the 94th Congress in Pub. L. No. 94-455, 90 Stat. 1520 (1976). *See* H.R. REP. No. 94-1345; 122 Cong. Rec. 16886 (June 8, 1976). According to Congressman Ullman, the sponsor of the bill that ultimately became § 501(h), "further decisions were made in committee markup sessions in 1974 . . . Throughout 1975, the Treasury Department, many of the charitable organizations interested in these proposals, and representatives of major religious organizations all joined with staff members to reach agreements . . ." *Id.*

(Although section 501(h) and its related provisions were passed as part of the Tax Reform Act of 1976, Pub. L. No. 94-455, the tax writing committees of both houses originally considered the measure as a separate bill, H.R. 13500. *See* H.R. REP. No. 94-1210; S. REP. No. 94-938; S. REP. No. 94-1236 (conference report) (all 94th Cong., 2d Sess. (1976)).

the congressionally-engineered "less restrictive alternative" to the lobbying restriction in section 501(c)(3). Rarely are courts in our position presented with such a ready-made, legislatively-created solution to the sort of first amendment problem raised here. We should therefore recognize that this action by Congress is entitled the great weight.

In addition to this prudential aspect of the relationship between the two subsections, there is an important logical connection. On the one hand, if section 501(h) truly offers a less restrictive alternative than section 501(c)(3) to organizations like Taxation, Taxation's remedy is to proceed under subsection (h) rather than under (c)(3).[27] If, on the other hand, section 501(h) is an *equally* or *more* restrictive means of confining charities to their proper purposes, one should be extremely reluctant to hold that Congress can and must produce a still better resolution of the competing interest than it has in either 501(h) or 501(c)(3). Bearing in mind the effort Congress has made to resolve these interests precisely, and this court's limited authority to second-guess that determination, I proceed to an examination of the purpose and effect of section 501(h).

Section 501(h) was enacted as part of the Tax Reform Act of 1976, Pub. L. No. 94-455 § 1307, 90 Stat. 1720 (1976). It permits organizations described in section 501(c)(3) to opt out of regulation under the "substantial part" standard of (c)(3) and come under precise quantitative limitations on the amount they may spend on influencing legislators ("lobbying expenditures") and the public ("grass roots expenditures"). I.R.C. § 501(h)(2)(A), (C).

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[27] Taxation has declined to do so. We discuss the significance of this decision at 22-24, *infra*.

Generally speaking, any section 501(c)(3) organization that is not a church may so elect. I.R.C. § 501(h)(5). By electing to be treated under section 501(h), an organization is permitted, subject to certain disclosure requirements, to expend on lobbying and "grass roots" political activity up to 25% of the amount it spends on exempt purposes specified in section 501(c)(3).[28] Expenditures in excess of this ceiling amount result in the imposition of a 25% tax on the excess. I.R.C. § 4911(a)(1).

The history of attempts to clarify and quantify the limits on the political activity of exempt organizations which culminated in the adoption of section 501(h) in 1976 is a fine example of congressional activity in response to first amendment concerns. The features of section 501(h) and its related provision, section 4911, combine to satisfy any valid objection that Taxation may have to the lobbying restriction. First, they represent a clear statement of Congress' understanding of the relationship between charitable purposes and political activity. Any ambiguity of purpose claimed to underlie the section 501(c)(3) lobbying restriction, *see* Taxation Br. at 16; majority op. at 45, is resolved by section 501(h)'s treatment of the subject.[29] Second, Taxation's objection that section 501(c)(3) denies *all* tax benefits to an organization that does *some* (i.e., a more than an insubstantial amount of) lobbying, is

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[28] I.R.C. § 4911(c) sets forth the formulae for determining the maximum expenditures permitted.

[29] Congress in facing the question of legislative activity by exempt organizations could have chosen to repeal the lobbying restriction. This it declined to do, suggesting that doubts about the purpose of that section as adopted in 1934 are largely misconceived.

addressed by section 4911's 25% tax on excess lobbying expenditures. I.R.C. § 4911(a). The loss of tax benefits is, under this system, directly proportional to the extent of the organization's lobbying activity, eliminating the alleged "massive overkill" effect of section 501(c)(3). *See* Taxation Br. at 17. Finally, the legislative history and structure of section 501(h) illustrates the weakness of the claim, *see* Taxation Br. at 15, that Congress is seeking to regulate speech because of its communicative impact.[30]

It remains to be considered whether the availability of the section 501(h) alternative is relevant here. I believe that it is, notwithstanding the fact that Taxation has elected not to come under that section's coverage.

As noted previously, the chief significance of section 501(h) for the purposes of this case lies in the fact that it represents a recent congressional enactment to meet the problems that Taxation now raises. The statute indicates (1) that Congress finds that legislative lobbying activity might be compatible with charitable purposes to a *limited* extent, and (2) that any charitable organization wishing to engage in legislative activity should, in the judgment

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[30] Particularly noteworthy is § 4911's "sliding scale" definition of the permitted level of political expenditures. This provision was included as an alternative to the § 501(c)(3) "substantial part" test, which created the possibility that two organizations of different size which spend the same dollar amount on lobbying would be treated differently because that amount bears a different relationship to the *total* expenditures of the organizations. *See* 122 Cong. Rec. S16884 (dail ed. June 8, 1976); *see also* "Americans United," Inc. v. Walters, 477 U.S. 1169, 1173 (D.C. Cir. 1973), *rev'd on jurisdictional grounds sub nom.* Alexander v. "Americans United" Inc., 416 U.S. 752 (1974).

of Congress, be subject to well-defined regulatory limits on their lobbying activities. Whether or not an organization chooses to elect coverage under section 501(h), these congressional determinations must be respected.

Although Taxation from all indications in the record would qualify for treatment under section 501(h), it testified before the District Court that it elected not to be so treated:

> [Taxation] has not made and does not plan to make, an election under sections 501(h) and 4911 of the Code. Such an election might require us to accept restrictions which are not justified or authorized under the First Amendment of the Constitution, on our right to communicate with our contributors and members regarding matters of legislative interest. Sections 501(h) and 4911 also fail to define with any narrow specificity such terms as "legislative activities" and "taxable expenditures". For this reason, an election under section 501(h) might require us to impose prior restraints on the publication of Articles in our weekly tax news-magazine, Tax Notes. An election under section 501(h) might also require us to accept limitations on our legislative activities which we believe are unconstitutional and which are not imposed on similarly situated tax exempt organizations, such as, for example, trade associations, fraternal societies, labor unions, veterans organizations, and in practice, churches. In addition, the income of an organization such as Taxation with Representation of Washington normally fluctuates widely from year to year. Therefore as a practical mat-

> ter, a percentage test—such as that in section 501(h)—to determine the permissable level of spending on legislative activities is unworkable.

Field Aff. at 2-3 (J.A. at 15-16).

Except for the same complaints of discriminatory treatment that it raises in this case, Taxation's alleged reasons for choosing to remain under section 501(c)(3) amount to conclusory objections to (1) the specificity of statutory terms in sections 501(h) and 4911, and (2) the "workability" of a quantitative expenditure limitation. These questions regarding section 501(h) are obviously not suited for resolution here.[31] However, we do not believe that this precludes us from recognizing the existence of the statute or the congressional determinations that it represents. Although Taxation cannot be compelled to elect coverage under section 501(h), this does not mean that its present case must be evaluated as if that statutory alternative did not exist.

From the foregoing, it is submitted that Congress has legitimately drawn a distinction between charitable organizations that engage in substantial lobbying and those that do not. The restrictions to which an organization is subject depend upon the extent of its exercise of the right to lobby, but in any event, those restrictions serve a clearly valid public interest and are drawn with sufficient precision to comport with the requirements of the first amendment.

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[31] It is noted that Taxation, while adverting in its affidavit to the alleged vagueness of terms used in §§ 501(h) and 4911, raised no similar vagueness objections to § 501(c)(3). Considerable deference should also be paid to the specific quantitive standards set forth in the statute. *See* Buckley v. Valeo, 424 U.S. 1, 30, 83 (1976).

III.

Next to be considered is Taxation's second claim that imposing the lobbying restriction on the activities of section 501(c)(3) organizations, while placing no similar restriction upon fraternal organizations exempted by sections 501(c)(8) and (10) or veterans' groups exempted by section 501(c)(19), discriminates against Taxation in a constitutionally impermissible manner. This claim is similarly rejected.

Recent legislative attempts to deal with the complex relationship of money, politics, and constitutional guarantees have provided the Supreme Court with several opportunities to set forth the standards applicable here. Those standards support the conclusion that Congress has acted consistently with the requirements of the first amendment.

In evaluating any claim of unlawful discrimination, whether under the constitutional strictures of the first, fifth and fourteenth amendments or under some other provision of law, it must be remembered that "[s]ometimes the grossest discrimination can lie in treating things that are different as though they were exactly alike . . ." *Buckley* v. *Valeo*, 424 U.S. 1, 97-98 (1976), *quoting Jenness* v. *Fortson*, 403 U.S. 431, 441-42 (1971). It cannot simply be presumed that two parties, one of who complains of treatment different from that received by the other, are situated so similarly that the difference rises to the level of "discrimination." Obviously, differential treatment of members of *different* classes of persons cannot be equated with differential treatment of persons identically situated. Constitutional scrutiny of an alleged "discrimination," in short, presupposes

that the essential characteristics of the complaining party are in the main indistinguishable from the characteristics of those who are alleged to be treated more favorably. Equal protection does not require that "things which are different in fact . . . be treated in law as though they were the same." *Tigner* v. *Texas*, 310 U.S. 141, 147 (1940).

We take it as beyond dispute that were Congress to preserve the existing benefit provisions favoring veterans' organizations while *wholly eliminating* those afforded other charitable organizations, Taxation would be without a colorable claim of discrimination under the first or fifth amendments.[32] Generally speaking, Congress is free, subject to the minimal constraint of "rationality,"[33] to determine that veterans' groups are worthy of those benefits while other groups with charitable or educational purposes are not. The fact that veterans' organizations would be permitted to engage in lobbying among their other activities[34] would not be cause for Taxation to complain of congressional discrimination favoring veterans' speech over its own. Government is free to choose the interests to which it offers support via the tax structure, even if as a result some groups

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[32] *See*, maj. op. Part IIA.

[33] *See* New Orleans v. Dukes, 427 U.S. 297, 303 (1976) (per curiam).

[34] Assuming the absence of other congressional limits upon such activity. Limits of this sort in fact presently exist with respect to veterans' organizations chartered by Act of Congress. *See, e.g.*, 36 U.S.C. § 90f (1976) (DAV shall be nonpolitical and may not support any candidate for office). These are discussed at 33-34 *infra*.

are able to exercise their speech rights at a lower effective cost than are others.[35]

The foregoing would not establish the constitutionality of a measure that conditioned receipt of a benefit by one group over another on the basis of particular political views or interests, nor that of one which imposed a direct burden on protected speech. What it does establish, however, is that when Congress determines that two organizations serve significantly different purposes, or present significantly different regulatory problems, the Constitution does not require it to afford them identical treatment.

The fatal defect in the majority opinion is its failure to recognize the different regulatory considerations presented by veterans' groups[36] and 501(c)(3) organizations. The majority adopts the tacit assumption that, but for the lobbying restriction, Taxation is for all relevant purposes legally indistinguishable from veterans' groups. The majority therefore draws the conclusion that the difference in treatment permitted by that restriction is discrimination touching on the fundamental right of free speech. I disagree strongly with the assumption that Taxation and veterans' groups are identically situated with respect to the purposes of Congress in conferring these tax benefits, and consequently cannot accept the conclusion the majority draws from it.

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[35] A contrary rule would place upon government the obligation of providing equal resources to all who would publish their views on any subject. That no such obligation exists is obvious, as the majority notes. Maj. op. at 22.

[36] Because the majority appears to agree that the statute read in conjunction with Treasury regulations does in fact restrict the lobbying activities of fraternal societies in a fashion similar to § 501(c)(3), this discussion is confined to Taxation's claims regarding veterans' groups.

The majority appears to view veterans' organizations simply as 501(c)(3) organizations which happen for purely technical reasons to occupy a separate Code subsection, 501(c)(19). That view ignores both Congress' own understanding of the Tax Code's provisions and the unique character, status and function of veterans' groups under the laws of the United States. Insofar as these reveal important differences between veterans' groups and charitable or educational groups in general, nothing in the first or fifth amendments forecloses Congress from legislating on the basis of those differences as it has done here. Far from being essentially fungible charities, Taxation and veterans' groups are fundamentally different in their purposes, their operations, and their responsibilities under the law. Those differences lead to the conclusion that Taxation has not been subjected to unconstitutional discrimination.

The fact that veterans' groups are treated in a statutory provision (501(c)(19)) distinct from the general exemption for charitable and educational organizations in section 501(c)(3) itself tends to suggest that Congress viewed these groups as essentially different types of organizations. The majority attributes this separate treatment to purely technical reasons, namely, the need to insulate veterans' organizations from the tax imposed on unrelated business income by the Tax Reform Act of 1969. Maj. op. at 40. *See* S. Rep. No. 92-1082, 92d Cong., 2d Sess. (1972); H.R. Rep. No. 92-851, 92d Cong., 2d Sess. (1972). That attempted explanation is not sufficient.

First, it appears that at the time it enacted section 501(c)(19), Congress viewed veterans' organizations as falling *outside* the scope of section 501(c)(3). In

stating their understanding of the existing law, the committee reports on section 501(c)(19) stated only that veterans' groups qualified as "social clubs" under section 501(c)(7) or as "social welfare organizations" under section 501(c)(4).[37] At the time Congress enacted 501(c)(19), then, it believed that veterans' groups were not classified with Taxation as 501(c)(3) groups subject to the lobbying restriction.[38] It viewed veterans' organizations as falling into a class with groups entitled to enjoy tax-exempt status without any restriction on their political activities.

Second, the legislative evolution of the specific provisions for income, gift and estate tax deductions of contributions shows that Congress, having originally extended the benefits of exempt status and deductibility to all types of charitable and educational groups, subsequently determined to withdraw it only from section 501(c)(3) organizations that engaged in substantial attempts to influence legislation.[39] The

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[37] H.R. REP. No. 92-851, 92d Cong., 2d Sess. 2 (1972); S. REP. No. 92-1082, 92d Cong., 2d Sess. 2 (1972).

[38] Given this recent interpretation by Congress, the pre-1934 legislative history cited by the majority, maj. op. at 36-38, is of little value. Whatever one might make of the "pre-history" of the lobbying restriction, since 1934 Congress has without deviation taken the view that veterans' organizations and section 501(c)(3) organizations are essentially different in character.

[39] The initial focus of the decision to deny these benefits to groups that lobbied was not upon the organizations' exempt status, but upon the deductibility of contributions to them. The condition placed upon exempt status which now appears in § 501(c)(3) was adopted in order to complement the denial of deductions for contributions to groups that lobby that is now § 170(c)(2)(D). *See* S. REP. No. 558, 73d Cong., 2d

basis for that decision need not be set forth explicitly for it to be entitled to this court's respect, but the previously quoted debate on that action shows that Congress was cognizant of the distinction it was drawing.

This evolution of the present section 501(c)(3)—first extending the benefits of exemption and deductibility, later paring them back—is precisely the sort of response to social experience and legislative experiment that the Supreme Court has held most worthy of judicial deference. Contrary to the majority opinion, the rule that "reform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind" [40] is fully applicable to this case notwithstanding the presence of first amendment concerns. That is the unmistakable meaning of the Supreme Court's holding in *Buckley* v. *Valeo*, *supra*, 424 U.S. 1 (1976).

In *Buckley*, the Court was presented with a challenge to various features of the Federal Election Campaign Act of 1971, 2 U.S.C. § 431 *et seq.* (1976). Among the issues there presented was the claim that the provision of the Act providing for federal funding of primary election campaigns, which allowed no funds to candidates for office who did not run in primary elections, unconstitutionally discriminated

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Sess. 30 (1934) (explaining change in exemption rules under the 1939 Code) prior § 101(6) by reference to change in deductibility under prior § 23(o)). This fact further supports the view that the principal intent of Congress in imposing the lobbying restriction was to curtail self-serving "donations" incompatible with the charitable purposes Congress sought to further.

[40] Williamson v. Lee Optical, 348 U.S. 483, 489 (1955).

against those candidates in violation of the first and fifth amendments. The Court rejected this challenge, holding that the different treatment was justified in view of Congress' power to structure the conduct of federal elections. The Court stated:

> [I]n deciding the constitutional propriety of the limitations in such a reform measure we are guided by the familiar principles that a 'statute is not invalid under the Constitution because it might have gone farther than it did,' *Roschen* v. *Ward*, 279 U.S. 337, 339, that a legislature need not 'strike at all evils at the same time,' *Semler* v. *Dental Examiners*, 294 U.S. 608, 610, and that 'reform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind,' *Williamson* v. *Lee Optical Co.*, 348 U.S. 483, 489.

424 U.S. at 105, *quoting Katzenbach* v. *Morgan*, 384 U.S. 641, 647 (1966) (footnote omitted).[41] In a footnote to this statement, the Court made explicit its

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[41] The Court in *Buckley* cited the Campaign Act's character as a "reform" measure, *id.* at 105, 107. The court's have long recognized, as the already cited legislative history itself makes clear, that section 501(c)(3) is a similar sort of remedial measure. *See, e.g.*, Seasongood v. Commissioner, 227 F.2d 907, 910 (6th Cir. 1955); "Americans United," Inc. v. Walters, 477 F.2d 1169, 1183 (D.C. Cir. 1973) (Wilkey, J., concurring), *rev'd on jurisdictional grounds sub nom.* Alexander v. "Americans United" Inc., 416 U.S. 752 (1974). The status of an Act of Congress as a "reform" measure is a question to be determined by reference to the intent evidenced by Congress in adopting it, and not to the predilections of a reviewing court. "Evils in the same field may be of different dimensions and proportions, requiring different remedies. *Or so the legislature may think.*" Williamson v. Lee Optical, 348 U.S. 483, 489 (1955) (emphasis added).

holding that this understanding of Congress' power was fully applicable in first amendment cases of precisely the character that is present here. *See id.* at 105 n. 143.

The statute at issue in *Buckley* was an attempt by Congress to regulate the effects of massed private wealth upon federal elections. As such, it presented concerns lying at the very heart of the political freedom protected by the first amendment. The regulation imposed by section 501(c)(3) can hardly be said to pose an equally or still more serious threat to those values.

When the specific actions of Congress relative to the status of veterans' groups, including its regulation of their political activities, are examined more closely than the majority is apparently willing to do, this conclusion is even more evident. Congress' decision in 1934 to limit the lobbying restriction to 501(c)(3) organizations—to take "one step at a time"—is amply supported by the contemporary and continuing "fact of American life"[42] regarding the unique status of veterans' organizations in our society. In view of this familiar social fact, Congress was clearly justified in focusing its attention on what it perceived to be the most serious abuse of the tax-exempt organization statutes, namely, the activities of the generally-described organizations presently defined in section 501(c)(3).[43]

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[42] Buckley v. Valeo, 424 U.S. at 98.

[43] The fact that the reform implemented by the lobbying restriction was first adopted in 1934 does not undermine its status as a proper "first step." The various statutory changes adopted since that time—the enactment of sections 501(h) (discussed at 19-22 *supra*) and 527 (regulating political action committees)—illustrate the continuing attention paid by Congress to this area in the intervening years.

War veterans have made unparalleled contributions to the creation and preservation of this nation. Their organizations have existed in this country from the beginning. These organizations have sought to aid disabled veterans, to assist their widows and orphans, and to provide for mutual support and assistance among those who served their country in time of war. *See generally* W. Glasson, Military Pension Legislation (1900). Some of these organizations play a vital continuing role in the administration of laws benefitting veterans, as Congress has specifically recognized and provided for. *See, e.g.*, 38 U.S.C. § 3402(a) (1976) (permitting veterans' organizations to represent veterans in presenting claims to Veterans' Administration and the furnishing of office space to them). The close coordination between veterans' organizations and the government is unique. Congress has continued to acknowledge the importance of veterans' organizations by incorporating them with federal charters in order to permit them to carry out their philanthropic purposes. *See, e.g.*, Pub. L. No. 97-83, 90 Stat. 1094 (Nov. 20, 1981) (chartering United States Submarine Veterans of World War II).[44] Because of the important and unique public role played by veterans' groups, Congress could properly regard them as a different kind of entity deserving *tax* treatment different from that

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[44] Other veterans' organizations are similarly incorporated. *See* note 47 *infra*.

Under standards adopted by the House and Senate Judiciary Committees, federal charters are granted only to organizations of "unique character," and which are "organized and operated solely for charitable, literary, educational, scientific, patriotic or civic improvement purposes . . . as nonpartisan and nonprofit organization[s] . . ." S. REP. No. 97-37, 97th Cong., 1st Sess. 2 (1981).

accorded the more generally described charitable organizations subject to section 501(c)(3).

It could do this, as *Buckley* demonstrates, even though a perceived effect of the different treatment might be the creation of an indirect burden on other groups' first amendment interests. *Buckley* presented a regulatory provision which made the receipt of a financial benefit (campaign funding) contingent upon the past success of a candidate in primary elections.[45] That case, much more so than this one, tested a statute which made political success—and therefore, the content and consequent popularity of one's political ideas—a condition on the receipt of a benefit. The Court nevertheless upheld the provision as one enacted "in furtherance of sufficiently important governmental interests" with little practical impact on the rights of the parties disadvantaged thereby. 424 U.S. at 95-96. Finding it evident that here, as there, "there are obvious differences in kind"[46] between veterans' organizations and section 501(c)(3) organizations, in my judgment the decision to restrict the lobbying activities of section 501(c)(3) organizations by placing a condition upon their receipt of tax benefits, without placing an identical condition upon veterans' organizations, was within the power of Congress.

Finally, it must be stressed that Congress *has in fact acted* to limit the lobbying and other political activities of the nation's more prominent veterans' groups, including the American Legion and AMVETS. The statutes governing these and other organizations of veterans chartered by Congress uniformly contain

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[45] Buckley v. Valeo, 424 U.S. at 97.

[46] *Id.*

provisions barring them from engaging in partisan political activity and otherwise limiting the political involvements they may pursue. In incorporating the Disabled American Veterans, for example, Congress provided that it "shall be *nonpolitical* and nonsectarian, and as an organization shall not promote the candidacy of any person seeking public office." 36 U.S.C. § 90f (1976) (emphasis added).[47] Indeed, most recently Congress has imposed charter restrictions, *identical* to the restrictions of section 501(c)(3), upon the United States Submarine Veterans of World War II and the Italian American War Veterans of the United States. Their charters were granted in 1981 by Congress subject to the restriction that they "shall not contribute to, support or otherwise participate in *any* political activity *or in any manner attempt to influence legislation.*" [48]

To the extent that such direct limitations on the activities of veterans' organizations exist it is not even necessary to consider the extent to which the different treatment accorded them and section 501(c)(3) organizations within the provisions of the Tax Code is justified by the government's interest in veterans' affairs. For to that extent, veterans'

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[47] *See also* 36 U.S.C. § 46 (1976) (American Legion "shall be nonpolitical and, as an organization, shall not promote the candidacy of any person seeking public office"); *id.* § 67d ("No part of the activities of [American Veterans of World War II] shall consist of carrying on propaganda" or of supporting any political party or candidate); *id.* § 86 (Blind Veterans of World War I "shall be nonpolitical and shall not be used for the dissemination of partisan principles"); *id.* § 1153 (Paralyzed Veterans of America).

[48] Pub. L. No. 97-82 § 8(c), 90 Stat. 1092 (Nov. 20, 1981); Pub. L. No. 97-83 § 8(c), 90 Stat. 1095 (Nov. 21, 1981) (emphasis added).

groups operate under constraints essentially similar or even identical[49] to those imposed by section 501 (c)(3) upon groups like Taxation, and hence no true "discrimination" in their favor occurs.[50] As the Supreme Court recently stated in *California Medical Association* v. *Federal Election Commission*, 101 S. Ct. 2712 (1981), in upholding section 441a(a)(1)(C) of the Federal Election Campaign Act,

> We have already concluded that § 441a(a)(1)(C) does not violate the First Amendment. In order to conclude that it nonetheless violates the equal protection component of the Fifth Amendment, we would have to find that because of this provision the Act burdens the First Amendment rights of persons subject to § 441a(a)(1)(C) to a greater extent than it burdens' the same rights of corporations and unions, and that such differential treatment is not justified. *We need not consider this second question—whether the discrimination alleged by appellants is justified —because we find no such discrimination.* Appellants' claim of unfair treatment ignores the plain fact that the statute as a whole imposes far *fewer* restrictions on individuals and unin-

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[49] *See id.*

[50] This is most clearly the case in the instance of contributions sought to be deducted from the estate tax under section 2055(a)(4). That section makes contributions to veterans' organizations deductible only if the contribution is "to or for the use of any veterans' organization *incorporated by Act of Congress . . .*" Any conditions placed upon the political activities of these groups in their corporate charters, then, are *explicitly* incorporated into the provision governing the deductibility of contributions, and the effect is as if section 2055 itself imposed the restriction on political involvement.

corporated associations than it does on corporations and unions.

Id. at 2724 (first emphasis added).

The restrictions imposed on the political activity of most veterans' organizations show that Congress has consistently responded to any perceived 'impurity' in the philanthropic purposes of those organizations.[51] The fact that it has chosen to do so by means other than an amendment to the Tax Code does not lessen the respect we owe its judgment. Congress is free not only to take "one step at a time" in solving a perceived problem, but also to choose different forms of solutions to such problems. "That first amendment interests are implicated should begin, not end our inquiry." *Citizens Against Rent Control* v. *City of Berkeley*, 102 S. Ct. 434, 444 (1981) (White, J., dissenting). As the Court stated in *California Medical Association*, even within the area of regulations touching on protected speech, Congress

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[51] I fail to see the relevance to the lobbying restriction here under scrutiny of the majority's assertion that one veteran's organization "endorsed a presidential candidate in the 1980 election." Maj. op. at 16 n.15. In actuality, it appears from the cited news source that it was a *Political Action Committee* formed by members of a veteran's organization that made the endorsement. (Wash. Post, Jan. 17, 1980). *See* N.Y. Times, Aug. 9, 1980, at 6 (*"To avoid risking its tax-exempt status,* the V.F.W. last year created a separate political action committee to back candidates." (emphasis added)). In view of the various restrictions imposed upon such committees, both under the Federal Election Campaign Act, *e.g.*, 2 U.S.C. § 441a(a)(1)(C) (1976) *and under the Tax Code itself, see* 26 U.S.C. § 527, the majority's comment is of no moment. Indeed, the restrictions imposed upon political committees go further to demonstrate the close attention given these concerns by Congress.

may determine "that these entities have *differing structures and purposes*, and that they therefore may require different forms of regulation in order to protect the integrity of the electoral process." 101 S. Ct. at 2724 (emphasis added).

IV.

There is unanimous agreement that the lobbying restriction in section 501(c)(3) does not impose an unconstitutional burden upon the exercise of Taxation's first amendment rights. The majority holds, however, that by not imposing upon veterans' organizations an identical restriction—the threat of losing their tax benefits under the Internal Revenue Code—Congress unconstitutionally discriminated against Taxation.

In my opinion, that holding fails to accord Congress the respect it is due, even in areas where regulation may place an indirect burden on first amendment interests, when legislating to insure that the public interest is best served. To the extent it ignores the fact that Congress has used means besides the tax system to regulate the otherwise fully protected political activity of veterans' groups, the majority leaps peremptorily past the threshold question of whether section 501(c)(3) groups are in fact discriminated against *at all*. *California Medical Association* v. *FEC*, *supra*. To the extent that it fails to take cognizance of the gradual development of the law governing political activity by exempt organizations which began with the passage of the lobbying restriction in 1934 *and which continues into the present*[82]—with explicit solicitude for the first amendment interest at stake—the majority fails to afford

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[82] *See* 33-34 *supra*.

Congress the respect due it in this field of endeavor. *Buckley* v. *Valeo*, *supra*.

Veterans' organizations are essentially different in character from other charitable and educational groups. They are particularly distinguishable from organizations like Taxation that are avowedly incorporated and operated chiefly or exclusively for the purpose of lobbying Congress on matters of public finance. Congress, in any event, was clearly justified in drawing that distinction, and in treating what it perceived to be abuses of the tax laws as it has here. Section 501(c)(3) accomplishes that objective in a wholly content-neutral way, and is therefore consistent with the constraints of the first amendment.

While the majority attributes the system of regulation here challenged to simple congressional "inadvertence," maj. op. at 33, I would afford it the respect dictated by *Buckley* and counseled by a long and sorry history of judicial forays into the legislative province. Here, Congress has treated veterans' groups differently from the vast undifferentiated mass of organizations claiming educational and charitable purposes. It has recognized that veterans' groups are unique entities having "differing structures and differing purposes, and that they therefore may require different forms of regulation . . ." *California Medical Association*, *supra*, 101 S. Ct. at 2724. Nothing in the majority opinion is persuasive either of the incorrectness of that conclusion or of Congress' lack of authority to legislate on the basis of it.

I therefore respectfully dissent. Judges Robb and Wilkey join herein.

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 79-1464

TAXATION WITH REPRESENTATION OF WASHINGTON, PLAINTIFF-APPELLANT

v.

DONALD T. REGAN, Secretary of the Treasury, ET AL., DEFENDANTS-APPELLEES

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that Donald T. Regan, Secretary of the Treasury, Roscoe L. Egger, Jr., Commissioner of Internal Revenue, and the United States of America, appellees in this action, hereby appeal to the Supreme Court of the United States from the judgment of the United States Court of Appeals for the District of Columbia Circuit entered in this action on March 26, 1982.

This appeal is taken pursuant to 28 U.S.C. § 1252.

/s/ Glenn L. Archer, Jr.
GLENN L. ARCHER, JR.
Assistant Attorney General
Tax Division
Department of Justice
Washington, D.C. 20530
Counsel for Appellees
Telephone: (202) 633-3361

Dated: This 23rd day of April, 1982.

APPENDIX D

Internal Revenue Code of 1954 (26 U.S.C.):

SEC. 170. CHARITABLE, ETC., CONTRIBUTIONS AND GIFTS.

(a) [as amended by Section 1906, Tax Reform Act of 1976, Pub. L. No. 94-455, 90 Stat. 1520] ALLOWANCE OF DEDUCTION.—

(1) GENERAL RULE.—There shall be allowed as a deduction any charitable contribution (as defined in subsection (c)) payment of which is made within the taxable year. A charitable contribution shall be allowable as a deduction only if verified under regulations prescribed by the Secretary.

* * * * *

(c) [as amended by Section 201, Tax Reform Act of 1969, Pub. L. No. 91-172, 83 Stat. 487, and by Sections 1307 and 1313, Tax Reform Act of 1976, *supra*] CHARITABLE CONTRIBUTION DEFINED.—For purposes of this section, the term "charitable contribution" means a contribution or gift to or for the use of—

(1) A State, a possession of the United States, or any political subdivision of any of the foregoing, or the United States or the District of Columbia, but only if the contribution or gift is made for exclusively public purposes.

(2) A corporation, trust, or community chest, fund, or foundation—

(A) created or organized in the United States or in any possession

thereof, or under the law of the United States, the District of Columbia, or any possession of the United States;

(B) organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes, or to foster national or international amateur sports competition (but only if no part of its activities involve the provision of athletic facilities or equipment), or for the prevention of cruelty to children or animals,

(C) no part of the net earnings of which inures to the benefit of any private shareholder or individual; and

(D) which is not disqualified for tax exemption under section 501(c)(3) by reason of attempting to influence legislation, and which does not participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of any candidate for public office.

A contribution or gift by a corporation to a trust, chest, fund, or foundation shall be deductible by reason of this paragraph only if it is to be used within the United States or any of its possessions exclusively for purposes specified in subparagraph (B).

(3) A post or organization of war veterans, or an auxiliary unit or society of, or trust or foundation for, any such post or organization—

(A) organized in the United States or any of its possessions, and

(B) no part of the net earnings of which inures to the benefit of any private shareholder or individual.

(4) In the case of a contribution or gift by an individual, a domestic fraternal society, order, or association, operating under the lodge system, but only if such contribution or gift is to be used exclusively for religious, charitable, scientific, literary, or educational purposes, or for the prevention of cruelty to children or animals.

(5) A cemetery company owned and operated exclusively for the benefit of its members, or any corporation chartered solely for burial purposes as a cemetery corporation and not permitted by its charter to engage in any business not necessarily incident to that purpose, if such company or corporation is not operated for profit and no part of the net earnings of such company or corporation inures to the benefit of any private shareholder or individual.

For purposes of this section, the term "charitable contribution" also means an amount treated under subsection (g) as paid for the use of an organization described in paragraph (2), (3), or (4).

SEC. 501. EXEMPTION FROM TAX ON CORPORATIONS, CERTAIN TRUSTS, ETC.

(a) [as amended by Section 101, Tax Reform Act of 1969, *supra*] EXEMPTION FROM TAXATION.—An organization described in subsection

(c) or (d) or section 401(a) shall be exempt from taxation under this subtitle unless such exemption is denied under section 502 or 503.

* * * * *

(c) LIST OF EXEMPT ORGANIZATIONS.—The following organizations are referred to in subsection (a):

(1) Corporations organized under Act of Congress, if such corporations are instrumentalities of the United States and, if, under such Act, as amended and supplemented, such corporations are exempt from Federal income taxes.

(2) Corporations organized for the exclusive purpose of holding title to property, collecting income therefrom, and turning over the entire amount thereof, less expenses, to an organization which itself is exempt under this section.

(3) [as amended by Sections 1307 and 1313, Tax Reform Act of 1976, Pub. L. No. 94-455, 90 Stat. 1520] Corporations, and any community chest, fund, or foundation, organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes, or to foster national or international amateur sports competition (but only if no part of its activities involve the provision of athletic facilities or equipment), or for the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private shareholder or individual, no substantial part of the activi-

ties of which is carrying on propaganda, or otherwise attempting, to influence legislation, (except as otherwise provided in subsection (h)), and which does not participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of any candidate for public office.

(4) Civic leagues or organizations not organized for profit but operated exclusively for the promotion of social welfare, or local associations of employees, the membership of which is limited to the employees of a designated person or persons in a particular municipality, and the net earnings of which are devoted exclusively to charitable, educational, or recreational purposes.

(5) Labor, agricultural, or horticultural organizations.

(6) [as amended by Section 1, Act of Feb. 2, 1966, Pub. L. No. 89-352, 80 Stat. 4] Business leagues, chambers of commerce, real-estate boards, boards of trade, or professional football leagues (whether or not administering a pension fund for football players), not organized for profit and no part of the net earnings of which inures to the benefit of any private shareholder or individual.

(7) [as amended by Section 1, Act of Oct. 20, 1976, Pub. L. No. 94-568, 90 Stat. 2697] Clubs organized for pleasure, recreation, and other nonprofitable purposes, substantially all of the activities of which are for such purposes and no part of the net

earnings of which inures to the benefit of any private shareholder.

(8) Fraternal beneficiary societies, orders, or associations—

(A) operating under the lodge system or for the exclusive benefit of the members of a fraternity itself operating under the lodge system, and

(B) providing for the payment of life, sick, accident, or other benefits to the members of such society, order or association or their dependents.

(9) [as amended by Section 121, Tax Reform Act of 1972, Pub. L. No. 91-172, 83 Stat. 487] Voluntary employees beneficiary associations providing for the payment of life, sick, accident, or other benefits to the members of such association or their dependents or designated beneficiaries, if no part of the net earnings of such association inures (other than through such payments) to the benefit of any private shareholder or individual.

(10) [as amended by Section 121, Tax Reform Act of 1972, Pub. L. No. 91-172, 83 Stat. 487] Domestic fraternal societies, orders, or associations, operating under the lodge system—

(A) the net earnings of which are devoted exclusively to religious, charitable, scientific, literary, educational, and fraternal purposes, and

(B) which do not provide for the payment of life, sick, accident, or other benefits.

(11) Teachers' retirement fund associations of a purely local character, if—

(A) no part of their net earnings inures (other than through payment of retirement benefits) to the benefit of any private shareholder or individual, and

(B) the income consists solely of amounts received from public taxation, amounts received from assessments on the teaching salaries of members, and income in respect of investments.

(12) (A) Benevolent life insurance associations of a purely local character, mutual ditch or irrigation companies, mutual or cooperative telephone companies, or like organizations; but only if 85 percent or more of the income consists of amounts collected from members for the sole purpose of meeting losses and expenses.

(B) In the case of a mutual or cooperative telephone company, subparagraph (A) shall be applied without taking into account any income received or accrued—

(i) from a nonmember telephone company for the performance of communication services which involve members of the mutual or cooperative telephone company,

(ii) from qualified pole rentals, or

(iii) from the sale of display listings in a directory furnished to the members of the mutual or cooperative telephone company.

(C) In the case of a mutual or cooperative electric company, subparagraph (A) shall be applied without taking into account any income received or accrued from qualified pole rentals.

(D) For purposes of this paragraph, the term "qualified pole rental" means any rental of a pole (or other structure used to support wires) if such pole (or other structure)—

(i) is used by the telephone or electric company to support one or more wires which are used by such company in providing telephone or electric services to its members, and

(ii) is used pursaunt to the rental to support one or more wires (in addition to the wires described in clause (i)) for use in connection with the transmission by wire of electricity or of telephone or other communications.

For purposes of the preceding sentence, the term "rental" includes any sale of the right to use the pole (or other structure).

(13) [as amended by Section 1, Act of Dec. 31, 1970, Pub. L. No. 91-618, 84 Stat.

1855] Cemetery companies owned and operated exclusively for the benefit of their members or which are not operated for profit; and any corporation chartered solely for the purpose of the disposal of bodies by burial or cremation which is not permitted by its charter to engage in any business not necessarily incident to that purpose, no part of the net earnings of which inures to the benefit of any private shareholder or individual.

(14) [as amended by Section 1, Act of April 22, 1960, Pub. L. No. 86-428, 74 Stat. 54, and by Section 1, Act of Feb. 2, 1966, Pub. L. No. 89-352, 80 Stat. 4] (A) Credit unions without capital stock organized and operated for mutual purposes and without profit.

(B) Corporations or associations without capital stock organized before September 1, 1957, and operated for mutual purposes and without profit for the purpose of providing reserve funds for, and insurance of, shares or deposits in—

(i) domestic building and loan associations,

(ii) cooperative banks without capital stock organized and operated for mutual purposes and without profit, or

(iii) mutual savings banks not having capital stock represented by shares.

(C) Corporations or associations organized before September 1, 1957, and operated for mutual purposes and without profit for the purpose of providing reserve funds for associations or banks described in clause (i), (ii), or (iii) of subparagraph (B); but only if 85 percent or more of the income is attributable to providing such reserve funds and to investments. This subparagraph shall not apply to any corporation or association entitled to exemption under subparagraph (B).

(15) [as amended by Section 8, Revenue Act of 1962, Pub. L. No. 87-834, 76 Stat. 960] Mutal insurance companies or associations other than life or marine (including interinsurers and reciprocal underwriters) if the gross amount received during the taxable year from the items described in section 822(b) (other than paragraph (1)(D) thereof) and premiums (including deposits and assessments) does not exceed $150,000.

(16) Corporations organized by an association subject to part IV of this subchapter or members thereof, for the purpose of financing the ordinary crop operations of such members or other producers, and operated in conjunction with such association. Exemption shall not be denied any such corporation because it has capital stock, if the dividend rate of such stock is fixed at not to exceed the legal rate of interest in the State of incorporation or 8 percent per annum, whichever is greater, on the value

of the consideration for which the stock was issued, and if substantially all such stock (other than nonvoting preferred stock, the owners of which are not entitled or permitted to participate, directly or indirectly, in the profits of the corporation, on dissolution or otherwise, beyond the fixed dividends) is owned by such association, or members thereof; nor shall exemption be denied any such corporation because there is accumulated and maintained by it a reserve required by State law or a reasonable reserve for any necessary purpose.

(17) [as added by Section 1, Act of July 14, 1960, Pub. L. No. 86-667, 74 Stat. 534] (A) A trust or trusts forming part of a plan providing for the payment of supplemental unemployment compensation benefits, if—

(i) under the plan, it is impossible, at any time prior to the satisfaction of all liabilities with respect to employees under the plan, for any part of the corpus or income to be (within the taxable year or thereafter) used for, or diverted to, any purpose other than the providing of supplemental unemployment compensation benefits,

(ii) such benefits are payable to employees under a classification which is set forth in the plan and which is found by the Secretary not to be discriminatory in favor of employees who are officers, share-

holders, persons whose principal duties consist of supervising the work of other employees, or highly compensated employees, and

(iii) such benefits do not discriminate in favor of employees who are officers, shareholders, persons whose principal duties consist of supervising the work of other employees, or highly compensated employees. A plan shall not be considered discriminatory within the meaning of this clause merely because the benefits received under the plan bear a uniform relationship to the total compensation, or the basic or regular rate of compensation, of the employees covered by the plan.

(B) In determining whether a plan meets the requirements of subparagraph (A), any benefits provided under any other plan shall not be taken into consideration, except that a plan shall not be considered discriminatory—

(i) merely because the benefits under the plan which are first determined in a nondiscriminatory manner within the meaning of subparagraph (A) are then reduced by any sick, accident, or unemployment compensation benefits received under State or Federal law (or reduced by a portion of such

benefits if determined in a nondiscriminatory manner), or

(ii) merely because the plan provides only for employees who are not eligible to receive sick, accident, or unemployment compensation benefits under State or Federal law the same benefits (or a portion of such benefits if determined in a nondiscriminatory manner) which such employees would receive under such laws if such employees were eligible for such benefits, or

(iii) merely because the plan provides only for employees who are not eligible under another plan (which meets the requirements of subparagraph (A)) of supplemental unemployment compensation benefits provided wholly by the employer the same benefits (or a portion of such benefits if determined in a nondiscriminatory manner) which such employees would receive under such other plan if such employees were eligible under such other plan, but only if the employees eligible under both plans would make a classification which would be nondiscriminatory within the meaning of subparagraph (A).

(C) A plan shall be considered to meet the requirements of subparagraph (A) during the whole of any year of

the plan if on one day in each quarter it satisfies requirements.

(D) The term "supplemental unemployment compensation benefits" means only—

(i) benefits which are paid to an employee because of his involuntary separation from the employment of the employer (whether or not such separation is temporary) resulting directly from a reduction in force, the discontinuance of a plant or operation, or other similar conditions, and

(ii) sick and accident benefits subordinate to the benefits described in clause (i).

(E) Exemption shall not be denied under subsection (a) to any organization entitled to such exemption as an association described in paragraph (9) of this subsection merely because such organization provides for the payment of supplemental unemployment benefits (as defined in subparagraph (D)(i)).

(18) [as added by Section 121, Tax Reform Act of 1972, Pub. L. No. 91-172, 83 Stat. 487] A trust or trusts created before June 25, 1959, forming part of a plan providing for the payment of benefits under a pension plan funded only by contributions of employees, if—

(A) under the plan, it is impossible, at any time prior to the satisfaction of

all liabilities with respect to employees under the plan, for any part of the corpus or income to be (within the taxable year or thereafter) used for, or diverted to, any purpose other than the providing of benefits under the plan,

(B) such benefits are payable to employees under a classification which is set forth in the plan and which is found by the Secretary not to be discriminatory in favor of employees who are officers, shareholders, persons whose principal duties consist of supervising the work of other employees, or highly compensated employees, and

(C) such benefits do not discriminate in favor of employees who are officers, shareholders, persons whose principal duties consist of supervising the work of other employees, or highly compensated employees. A plan shall not be considered discriminatory within the meaning of this subparagraph merely because the benefits received under the plan bear a uniform relationship to the total compensation, or the basic or regular rate of compensation, of the employees covered by the plan.

(19) [as added by Section 1, Act of Aug. 29, 1972, Pub. L. No. 92-418, 86 Stat. 656] A post or organization of war veterans, or an auxiliary unit or society of, or a trust or foundation for, any such post or organization—

(A) organized in the United States or any of its possessions,

(B) at least 75 percent of the members of which are war veterans and substantially all of the other members of which are individuals who are veterans (but not war veterans), or are cadets, or are spouses, widows, or widowers of war veterans or such individuals, and

(C) no part of the net earnings of which inures to the benefit of any private shareholders or individual.

(20) [as added by Section 2134, Tax Reform Act of 1976, Pub. L. No. 94-455, 90 Stat. 1520, and amended by Section 703, Revenue Act of 1978, Pub. L. No. 95-600, 92 Stat. 2763] An organization or trust created or organized in the United States, the exclusive function of which is to form part of a qualified group legal services plan or plans, within the meaning of section 120. An organization or trust which receives contributions because of section 120(c)(5)(C) shall not be prevented from qualifying as an organization described in this paragraph merely because it provides legal services or indemnification against the cost of legal services unassociated with a qualified group legal services plan.

(21) [as added by Section 4, Black Lung Benefits Revenue Act of 1977, Pub. L. No. 95-227, 92 Stat. 11] A trust or trusts established in writing, created or organized in the United States, and contributed to by any person (except an insurance company) if—

(A) the purpose of such trust or trusts is exclusively—

(i) to satisfy, in whole or in part, the liability of such person for, or with respect to, claims for compensation for disability or death due to pneumoconiosis under Black Lung Acts;

(ii) to pay premiums for insurance exclusively covering liability; and

(iii) to pay administrative and other incidental expenses of such trust (including legal, accounting, actuarial, and trustee expenses) in connection with the operation of the trust and the processing of claims against such person under Black Lung Acts; and

(B) no part of the assets of the trust may be used for, or diverted to, any purpose other than—

(i) the purpose described in subparagraph (A), or

(ii) investment (but only to the extent that the trustee determines that a portion of the assets is not currently needed for the purposes described in subparagraph (A)) in—

(I) public debt securities of the United States,

(II) obligations of a State or local government which are not in

default as to principal or interest, or

(III) time or demand deposits in a bank (as defined in section 581) or an insured credit union (within the meaning of section 101(6) of the Federal Credit Union Act, 12 U.S.C. 1752(6)) located in the United States, or

(iii) payments into the Black Lung Disability Trust Fund established under section 3 of the Black Lung Benefits Revenue Act of 1977, or into the general fund of the United States Treasury (other than in satisfaction of any tax or other civil or criminal liability of the person who established or contributed to the trust).

For purposes of this paragraph the term "Black Lung Acts" means part C of title IV of the Federal Mine Safety and Health Act of 1977, and any State law providing compensation for disability or death due to pneumoconiosis.

(22) A trust created or organized in the United States and established in writing by the plan sponsors of multiemployer plans if—

(A) the purpose of such trust is exclusively—

(i) to pay any amount described in section 4223(c) or (h) of the Employee Retirement Income Security Act of 1974, and

(ii) to pay reasonable and necessary administrative expenses in connection with the establishment and operation of the trust and the processing of claims against the trust,

(B) no part of the assets of the trust may be used for, or diverted to, any purpose other than—

(i) the purpose described in subparagraph (A), or

(ii) the investment in securities, obligations, or time or demand deposits described in clause (ii) of paragraph (21)(B),

(C) such trust meets the requirements of paragraphs (2), (3), and (4) of section 4223(b), 4223(h), or, if applicable, section 4223(c) of the Employee Retirement Income Security Act of 1974, and

(D) the trust instrument provides that, on dissolution of the trust, assets of the trust may not be paid other than to plans which have participated in the plan or, in the case of a trust established under section 4223(h) of such Act, to plans with respect to which employers have participated in the fund.

* * * * *

SEC. 2055. TRANSFERS FOR PUBLIC, CHARITABLE, AND RELIGIOUS USES.

(a) IN GENERAL.—For purposes of the tax imposed by section 2001, the value of the taxable

estate shall be determined by deducting from the value of the gross estate the amount of all bequests, legacies, devises, or transfers—

(1) to or for the use of the United States, any State, any political subdivision thereof, or the District of Columbia, for exclusively public purposes;

(2) [as amended by Section 201, Tax Reform Act of 1969, *supra*, and by Sections 1307 and 1313, Tax Reform Act of 1976, *supra*] to or for the use of any corporation organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes, including the encouragement of art, or to foster national or international amateur sports competition (but only if no part of its activities involve the provision of athletic facilities or equipment), and the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private stockholder or individual, which is not disqualified for tax exemption under section 501(c)(3) by reason of attempting to influence legislation, and which does not participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of any candidate for public office;

(3) [as amended by Section 201, Tax Reform Act of 1969, *supra*, and by Section 1307, Tax Reform Act of 1976, *supra*] to a trustee or trustees, or a fraternal society, order, or association operating under the lodge system, but only if such contributions

or gifts are to be used by such trustee or trustees, or by such fraternal society, order, or association, exclusively for religious, charitable, scientific, literary, or educational purposes, or for the prevention of cruelty to children or animals, such trust, fraternal society, order, or association would not be disqualified for tax exemption under section 501(c)(3) by reason of attempting to influence legislation, and such trustee or trustees, or such fraternal society, order, or association, does not participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of any candidate for public office; or

(4) to or for the use of veterans' organization incorporated by Act of Congress, or of its departments or local chapters or posts, no part of the net earnings of which inures to the benefit of any private shareholder or individual.

* * * * *

SEC. 2522. CHARITABLE AND SIMILAR GIFTS.

(a) CITIZENS OR RESIDENTS.—In computing taxable gifts for the calendar quarter, there shall be allowed as a deduction in the case of a citizen or resident the amount of all gifts made during such quarter to or for the use of—

(1) the United States, any State, or any political subdivision thereof, or the District of Columbia, for exclusively public purposes;

(2) [as amended by Section 201, Tax Reform Act of 1969, *supra*, and by Section 1307 and 1313, Tax Reform Act of 1976, *supra*] a corporation, or trust, or community chest, fund, or foundation, organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes, or to foster national or international amateur sports competition (but only if no part of its activities involve the provision of athletic facilities or equipment), including the encouragement of art and the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private shareholder or individual, which is not disqualified for tax exemption under section 501(c)(3) by reason of attempting to influence legislation, and which does not participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of any candidate for public office;

* * * * *

(4) posts or organizations of war veterans, or auxiliary units or societies of any such posts or organizations, if such posts, organizations, units, or societies are organized in the United States or any of its possessions, and if no part of their net earnings inures to the benefit of any private shareholder or individual.

* * * * *

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Supreme Court, U.S.
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CLERK

No. 81-2268

In the Supreme Court of the United States

OCTOBER TERM, 1982

DONALD T. REGAN, SECRETARY OF THE TREASURY, ET AL.,
APPELLANTS

v.

TAXATION WITH REPRESENTATION OF WASHINGTON

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

JOINT APPENDIX

REX E. LEE
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

JOHN CARY SIMS
(Counsel of Record)
Suite 700
2000 P Street, N.W.
Washington, D.C. 20036
(202) 785-3704

APPEAL DOCKETED JUNE 22, 1982
PROBABLE JURISDICTION NOTED OCTOBER 4, 1982

INDEX

	Page
1. District Court Docket Entries	1
2. Court of Appeals Docket Entries	3
3. Complaint	7
4. Answer	11
5. Plaintiff's Statement of Material Facts	14
6. Affidavit of Thomas F. Field	17
Exhibit A	27
Exhibit B (excerpt)	35
Exhibit C	47
7. Defendants' Statement of Material Facts	49
8. Plaintiff's Response to Defendants' Statement of Material Facts	51
9. Appendices A and C to Reply Memorandum by Plaintiff	53
10. Judgment of Court of Appeals	58
11. Order Noting Probable Jurisdiction	59

RELEVANT DOCKET ENTRIES

DATE	NR.	PROCEEDINGS
1978		
May		
	10	COMPLAINT; appearance.
May	10	SUMMONS (4) and copies (4) of complaint issued U.S. Atty. ser 5-12-78; Deft. #1 ser 5-24-78. #2 ser 6-12-78.
May	24	AFFIDAVIT of service by counsel for pltff., of summons and complaint upon the Atty Gen. by certified mail on May 11, 1978; Exhibit.
Jul	10	STIPULATION and ORDER extending time to 8-10-78 for defts. to respond to the complaint. (N) Pratt, J.
Aug	10	ANSWER by Defts. to Complaint; Appearance of Robert L. Gordon.
Aug	10	*CALENDARED* (CAL/N)
Aug	11	MOTION by Pltff. for Summary Judgment; P & A; Table of Contents; Table of Authorities; Affidavit; Attachment; Statement.
Aug	23	STIPULATION and ORDER filed Aug. 18, 1978 extending time to 9-29-78 for defts. to respond to motion for summary judgement. (N) Pratt, J.
Sept	27	MOTION by defts. for extension of time to file opposition to pltff's motion for summary judgment and cross-motion for summary judgment.
Oct	2	ORDER filed Sept. 28, 1978 granting motion of deft. for extension of time to file opposition & cross-motion from 9-29-78 to 10-16-78. (N) Pratt, J.
Oct	16	MOTION by defts. for leave to exceed 35 page limit in memorandum in support of their cross-motion to dismiss complaint; Exhibit (orig.)
Oct	17	MOTION by defts. for leave to file corrected copy of memorandum in support of cross-motion for summary judgment; Exhibit (orig.)
Oct	18	MOTION by defts. for leave to exceed 35 page limit in memorandum in support of their cross-motion to dismiss complaint. "Let this be filed." (FIAT) Pratt, J.
Oct	18	CROSS-MOTION by defts. for summary judgment; statement; memorandum.
Oct	20	ORDER filed Oct. 19, 1978 granting motion of defts. for leave to file the attached corrected copy of their memorandum in support of their cross-motion for summary judgment with table of citations. (N) Pratt, J.

DATE	NR.	PROCEEDINGS
Oct	19	CORRECTED copy of memorandum by defts. in support of cross-motion for summary judgment; table of contents.
Oct	24	RESPONSE by pltffs. to defts. statement of material facts.
Oct	24	REPLY Memorandum by pltffs. in support of its motion for summary judgment, and in opposition to defts. cross-motion for summary judgment; table of contents; table of authorities; appendix A, B, C & D.
1979		
Jan	31	MEMORANDUM OPINION (N) Pratt, J.
Feb	1	ORDER filed Jan. 31, 1979 denying motion of pltff. for summary judgment and granting motion of deft. for summary judgment and dismissing action. (N) Pratt, J.
Mar	27	NOTICE of appeal by pltf. from order of 1-31-79. $5.00 paid and credited to U.S. Treasury; copies mailed to John J. McCarthy, and Earl J. Silbert.
May	7	RECORD on Appeal delivered to USCA; Receipt acknowledged. (79-1464)
1981		
June	18	COPY ORDER U.S.C.A. filed 6-11-81 granting *en banc* hearing.
1982		
Apr.	09	CERTIFIED copy of Judgment filed 3-26-82 in USCA REVERSING and REMANDING to the District Court for further proceedings consistent with the opinion of this Court. OPINION. (USCA#79-1464)
Apr 13		TRANSMITTAL letter from USCA with 1 volume original record.
Apr 29		COPY of ORDER filed Apr. 29, 1982 in USCA directing Clerk, USDC to return the mandate issued on Apr. 8, 1982. (mandate returned to USCA on 5-12-82)

GENERAL DOCKET
UNITED STATES COURT OF APPEALS
FOR THE
DISTRICT OF COLUMBIA CIRCUIT

DATE	FILINGS—PROCEEDINGS	Filed
(D)5-7-79	Certified Original Record (1 vol.) (n-2)	
(D)6-8-79	4-Appellant's motion to extend time to file brief to 7-18-79 (m-8)	
(E)6-13-79	Clerk's order granting appellant's motion to extend time to file brief to July 18th	
(D)7-12-79	4-Appellant's motion for leave to file motion to extend time to file brief (m-12)	
(E)7-17-79	Clerk's order granting appellant's motion for leave to file motion to extend time to file brief and granting motion to August 1, 1979	
(E)7-17-79	4-Appellant's motion to extend time to file brief—granted	
(T)8-1-79	15-Appellant's brief (m-1)	
(T)8-1-79	7-Appendix (m-1)	
(D)9-5-79	15-Appellees' brief (m-4)	
(T)9-24-79	15-Appellant's reply brief (m-21)	
(T)3-7-80	Clerk's order, sua sponte, that the following times are allotted for oral argument: Appellant—15 minutes; appellee—15 minutes; only one counsel per side will be allowed to argue	
(T)3-10-80	4-Letter from counsel for appellant advising of additional authorities pursuant to Rule 28(j), FRAP (m-10)	
(E)3-18-80	Argued before MacKinnon, Robb* and Mikva, CJ's.	
(D)7-21-80	4-Letter from counsel for appellant advising of additional authorities pursuant to Rule 28(j), FRAP (m-18)	
(H)4-14-81	Judgment affirming the judgment of the District Court, and appellant's constitutional challenge to the IRS's denial of § 501(c)(3) status is rejected, all in accordance withe the Opinion for the Court filed herein this date. Vacated 6-11-81	
(T)04-22-81	1-Appellees' bill of costs (m-20)	
(T)04-28-81	15-Appellant's petition for rehearing and suggestion for rehearing en banc (m-28)	
(B)05-04-81	Clerk's order, sua sponte, that pursuant to Rule 43 of the F.R.A.P., the Clerk is directed to delete the name of W. Michael Blumenthal as a party appellee and to substitute therefore the name of Donald T. Regan	

DATE	FILINGS—PROCEEDINGS	Filed
(R)6-1-81	Per curiam order sua sponte, that the Opinion for the Court filed by Circuit Judge MacKinnon in this case on April 14, 1981 be and it hereby is amended as follows (see order for details)	
(C)06-11-81	Per Curiam order, en banc, that the majority opinion, dissenting opinion and judgment all entered 4/14/81 be and same are hereby vacated; The parties are directed to submit 25 additional copies of each brief previously filed and 25 additional copies of joint appendix, both no later then 7/30/81; Parties are further directed to submit 30 copies of a supplemental brief on rehearing containing argument based upon any new authorities, comment upon the panel opinion and further argument addressed to the following issues: (1) The appropriate standard of review; (2) Whether a distinction between veterans and fraternal societies, on the one hand, and other § 501(c)(3) organizations, on the other, is Constitutionally justifiable; The Supplemental briefs on rehearing shall be filed in accordance with the following schedule: Appellant—7/20/81; Appellees—8/31/81; Oral argument before the en banc Court will be heard on 10/14/81; CJ Robinson; Wright, McGowan, Tamm, MacKinnon, Robb, Wilkey, Wald, Mikva, Edwards and Ginsburg, CJs (CJ Tamm, MacKinnon and Robb would not rehear this matter en banc)	
(G)07-21-81	25-Appellant's supplemental brief on rehearing en banc (m-20)	
(G)08-27-81	25-Appellees' supplemental brief on rehearing en banc (m-26)	
(G)10-05-81	Clerk's order, sua sponte, that the following times are allotted for the oral argument of this case: Appellant—25 minutes; Appellees—25 minutes.	
(G)10-14-81	Argued En Banc, before, CJ Robinson, Wright, Tamm, MacKinnon, Robb, Wilkey, Wald, Mikva, Edwards and Ginsburg, CJs	
(V)12-29-81	15-Letter from counsel for appellant advising of additional authorities pursuant to FRAP 28(j) (m-29)	
(S)03-26-82	Opinion for the Court filed by CJ Mikva	
(S)03-26-82	Dissenting opinion filed by CJ MacKinnon	
(S)03-26-82	Judgment that the judgment of the District Court is reversed and the case is remanded for further proceedings consistent with the opinion filed	
(S)04-08-82	Certified copy of judgment and copy of opinion issued to District Court	

DATE	FILINGS—PROCEEDINGS	Filed
(C)04-08-82	1-Appellant's bill of costs (m-7)	
(C)04-13-82	Receipt date 4/13/82 from Clerk, District Court for 1 vol. original record	
(C)04-16-82	4-Appellees' motion for stay of mandate (m-16)	
(C)04-23-82	15-Motion of Disabled American Veterans and Paralyzed Veterans of America for leave to intervene (m-23)	
(C)04-23-82	4-Notice of appeal to Supreme Court by Donald T. Regan, Sec. of Treasury, et al. (m-23)	
(C)04-23-82	4-Notice of appeal of Disabled American Veterans and Paralyzed Veterans of America (m-23)	
(V)04-29-82	Per Curiam order that appellees' motion for stay of mandate, construed as a motion to recall mandate, be, and it is hereby granted. The Clerk of the U.S. District Court for the District of Columbia is directed to return the mandate previously issued herein on April 8, 1982, as promptly as the business of his office permits and the Clerk of this Court is directed not to reissue the mandate herein for a period of 30 days from the date of this order; CJ Robinson, Wright, Tamm, MacKinnon, Robb, Wilkey, Wald, Mikva, Edwards and Ginsburg, CJs	
(C)04-30-82	11-Motion of American Legion to intervene and for expeditious determination of this motion (m-30)	
(C)05-03-82	15-Motion of Veterans of Foreign Wars of the United States for leave to intervene (m-3)	
(C)05-04-82	15-Corrected motion of Veterans of Foreign Wars of the United States for leave to intervene (m-3)	
(C)05-10-82	Per Curiam order, en banc, that the Clerk is directed to file appellees' letter dated 5/3/82 as a motion for leave to file a single response to any pending motions to intervene and appellees' motion to file a single response is granted. Counsel for appellees may file, on or before May 14, 1982, an original and 14 copies of a single response to any motions for intervention which are still pending at the time said response is tendered; CJ Robinson; Wright, Tamm, MacKinnon, Robb, Wilkey, Wald, Mikva, Edwards, and Ginsburg, CJs	
(C)05-10-82	1-Appellees' letter dated 5/3/82—filed as appellees' motion for leave to file single response to any pending motions to intervene—GRANTED per above order	
(C)05-14-82	15-Appellees' (Fed) opposition to motions for intervention (m-14)	

DATE	FILINGS—PROCEEDINGS	Filed
(T)05-17-82	4-Reply of Disabled American Veterans and Paralyzed Veterans of America to Appellees' opposition to motions for intervention. (m-17)	
(C)05-18-82	12-Reply of American Legion to appellees' (Fed.) opposition to motions for intervention (m-18)	
(T)05-25-82	15-Appellees' motion for further stay of mandate (m-25)	
(V)05-27-82	Per Curiam order that the motion of Disabled American Veterans, et al., American Legion, Veterans of Foreign Wars of the United States for leave to intervene are denied and the Clerk is directed to note the docket accordingly; CJ Robinson, Wright, Tamm, MacKinnon, Robb, Wilkey, Wald, Mikva, Edwards and Ginsburg, CJs	
(C)06-22-82	Copy of letter from Clerk, SC stating that "The motions of Disabled American Veterans and Paralyzed Veterans of American for leave to intervene as party appellants is denied. Motion of American Legion for leave to intervene as party appellee is denied. Motion of Veterans of Foreign Wars of the US for leave to intervene is denied. Justice Brennan, Justice Blackmun and Justice O'Connor would defer consideration of these motions to the docketing and consideration of the jurisdictional statement"—in SC No. (not stated on letter) on June 21, 1982	
(B)06-25-82	Notice from Clerk, Supreme Court that petition for writ of certiorari was filed on 06-22-82 in SC No. 81-2338	
(C)07-29-82	Notification from Clerk, SC that petition for writ of certiorari was filed in SC No. 82-134 on July 23, 1982	
(V)08-10-82	Per Curiam order, en banc, that appellees' motion for further stay of mandate is granted and the Clerk is directed not to reissue the mandate herein until final disposition of this matter by the Supreme Court of the United States; CJ Robinson, Wright, Tamm, MacKinnon, Wilkey, Wald, Mikva, Edwards and Ginsburg, CJs	
(T)10-06-82	Certified copy of order from Clerk, Supreme Court noting probable jurisdiction in Supreme Court No. 81-2338 on 10-04-82	

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CIVIL ACTION NO. 78-0834

TAXATION WITH REPRESENTATION OF WASHINGTON,
PLAINTIFF,
2369 North Taylor Street
Arlington, Virginia 22207
(703) 527-2605

v.

W. MICHAEL BLUMENTHAL,
SECRETARY OF THE TREASURY,
JEROME KURTZ, COMMISSIONER OF INTERNAL REVENUE,
AND
THE UNITED STATES OF AMERICA, DEFENDANTS.

COMPLAINT FOR DECLARATORY RELIEF

1. This is an action for declaratory judgment with respect to the initial tax exempt qualification of an organization described in section 501(c)(3) of the Internal Revenue Code ("the Code").

2. This Court has jurisdiction under 26 U.S.C. § 7428.

3. Plaintiff Taxation with Representation of Washington ("TWRW") is incorporated under the District of Columbia Non-Profit Corporation Act. Its principal office is located in Arlington, Virginia.

4. The defendants are W. Michael Blumenthal, Secretary of the Treasury, Jerome Kurtz, Commissioner of Internal Revenue, and the United States of America.

5. TWRW was formed on June 14, 1977, to absorb and carry forward the courtroom and legislative advocacy activities conducted by two other nonprofit organizations, Tax Analysts and Advocates ("TAA") and Taxation with Representation ("TWR").

6. TAA is classified by the Internal Revenue Service as a tax exempt charitable and educational group under section 501(c)(3) of the Code. It engages in public interest tax-

related litigation and publishes a weekly journal on federal tax matters. TWR is classified by the Internal Revenue Service as a tax exempt social welfare organization under section 501(c)(4) of the Code. It is principally engaged in representing the interests of ordinary taxpayers at legislative and administrative hearings.

7. Both TAA and TWR are financed through public contributions. In addition, TAA (but not TWR) is partly supported by publication receipts and foundation grants.

8. Under current law, contributions to TAA for its courtroom advocacy work are tax deductible, but contributions to TWR for its legislative advocacy are not. In addition, foundations may support the courtroom advocacy of TAA, but may not, *without penalty*, support the legislative advocacy of TWR.

9. The Internal Revenue Service ("IRS"), an agency of defendant United States of America, has ruled that TWRW does not qualify for exempt status under section 501(c)(3) of the Code. The IRS has rejected TWRW's request for exempt status under section 501(c)(3) of the Code solely because of TWRW's stated purpose of attempting to influence legislation.

10. On June 27, 1977, TWRW filed with the IRS a completed application for recognition of exeption under section 501(c)(3) of the Code. On October 6, 1977, the IRS requested additional information to complete its consideration of the application. This information was timely furnished to the IRS on November 1, 1977. The IRS denied recognition of exemption under section 501(c)(3) of the Code on November 25, 1977.

11. On December 13, 1977, TWRW filed a timely protest of the IRS denial and requested a conference on the exemption application with the IRS. On January 10, 1978, a conference was held between Thomas F. Field of TWRW and Edward K. Karcher of the Exempt Organizations Division of the IRS.

12. On February 14, 1978, the IRS issued a final adverse ruling denying TWRW exempt status under section 501(c)(3) of the Code.

13. TWRW has exhausted its administrative remedies.

14. If TWRW were exempt from federal income taxation under section 501(c)(3) of the Code, it would be eligible to receive contributions which would be tax-deductible to donors under sections 170(c)(2), 2055(a)(2), 2106(a)(2) and 2522 of the Code. Based on the experience of TAA and TWR, this means that individual contributions would be approximately 23 percent greater than otherwise. In addition, private foundations would be entitled to provide funds for the general support of TWRW's activities without incurring tax liability under Code section 4945(d)(5) as a result of their contributions. In practice, foundations will not make grants to TWRW if there is any possibility of incurring section 4945 tax penalties. TWRW's efforts to raise funds to support its activities are thus severely hampered by the IRS denial of section 501(c)(3) status.

15. TWRW would qualify for section 501(c)(3) status except for its stated purpose of attempting to influence legislation.

16. The denial of section 501(c)(3) status to TWRW on the ground that it may engage in substantial attempts to influence legislation is unconstitutional in the following respects:

(a) the restrictions on substantial attempts to influence legislation unconstitutionally abridge the freedoms of speech, association, and press, and the right of petition of TWRW and its members by conditioning the benefits of eligibility under section 501(c)(3) upon the surrender of such First Amendment rights and freedoms;

(b) the restrictions on substantial attempts to influence legislation deny TWRW and its members the equal protection of the laws, as guaranteed by the due process clause of the Fifth Amendment, since organizations which are similarly situated in relevant respects are, without regard to whatever attempts they make to influence legislation, granted tax benefits while comparable benefits are denied to TWRW;

(c) the restrictions on substantial attempts to influence legislation contained in section 501(c)(3) are unconstitutional on the ground of vagueness since they lack

the specificity required where a statute touches upon the exercise of First Amendment freedoms.

WHEREFORE, plaintiff prays that the Court declare (1) that defendants' denial of exempt status to plaintiff is improper since the denial is based on a statutory restriction which is unconstitutional, (2) declare that plaintiff is entitled to exempt status under section 501(c)(3) of the Code, and (3) grant such other relief as the Court may deem just and proper.

Respectfully submitted,

/s/_____

JOHN CARY SIMS
Suite 700
2000 P Street, N.W.
Washington, D.C. 20036
(202) 785-3704

EDWARD M. QUINN
THOMAS F. FIELD
2369 North Taylor Street
Arlington, Virginia 22207
(703) 532-1850
Attorneys for Plaintiff

May 10, 1978

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

CIVIL ACTION NO. 78-0834

TAXATION WITH REPRESENTATION OF WASHINGTON,
PLAINTIFF
2369 North Taylor Street
Arlington, Virginia 22207
(703) 527-2605

v.

W. MICHAEL BLUMENTHAL,
Secretary of the Treasury,
Washington, D.C. 20220
(202) 566-2000

JEROME KURTZ,
Commissioner of Internal Revenue,
Washington, D.C. 20224
(202) 783-8400

and

UNITED STATES OF AMERICA, DEFENDANTS
c/o United States Department of Justice,
Washington, D.C. 20530
(202) 739-3633

ANSWER

Defendants, through their attorneys, answer plaintiff's Complaint by alleging as follows:

1. Defendants deny that plaintiff is an organization described in Section 501(c)(3) of the Internal Revenue Code, but otherwise admit paragraph 1.

2. Defendants admit that jurisdiction is present, and aver that jurisdiction for a suit brought under 26 U.S.C., § 7428 is granted by 28 U.S.C., § 1346(e).

3. Defendants admit paragraph 3.

4. Defendants deny that W. Michael Blumenthal, Secretary of the Treasury, and Jerome Kurtz, Commissioner of Internal Revenue are proper defendants. Defendants aver that in a suit brought under 26 U.S.C., § 7428 pursuant to 28 U.S.C., § 1346(e), the United States is the only proper defendant.

5. Defendants admit that plaintiff was formed on June 14, 1977. Defendants lack knowledge or information sufficient to form a belief as to the truth of the remainder of paragraph 5.

6. Defendants admit paragraph 6.

7. Defendants admit paragraph 7.

8. Defendants admit that under present law, contributions to Tax Analysis and Advocates ("TAA") are tax deductible, but contributions to Taxation With Representation ("TWR") for its legislative advocacy are not. Defendants also admit that foundations may support TAA, but may not, without penalty, support the legislative advocacy of TWR. Defendants otherwise deny paragraph 8.

9. Defendants admit paragraph 9.

10. Defendants admit paragraph 10.

11. Defendants admit paragraph 11.

12. Defendants admit paragraph 12.

13. Defendants admit paragraph 13.

14. Defendants admit the first and third sentences of paragraph 14. Defendants lack knowledge or information sufficient to form a belief as to the truth of the second, fourth and fifth sentences of paragraph 14.

15. Defendants admit that based on the facts presented to them by plaintiff in its administrative application, plaintiff would have qualified for Section 501(c)(3) status at that time except for its stated purpose of attempting to influence legislation. Defendants otherwise deny paragraph 15.

16. Defendants deny paragraph 16.

WHEREFORE, defendants pray that judgment be entered in their favor and that this action be dismissed.

/s/
JOHN J. MCCARTHY
DONALD J. GAVIN
ROBERT L. GORDON
Attorneys
Tax Division
U.S. Department of Justice
Washington, D.C. 20530
(202) 739-3633

OF COUNSEL:
EARL J. SILBERT
United States Attorney for
the District of Columbia

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CIVIL ACTION NO. 78-0834

TAXATION WITH REPRESENTATION OF WASHINGTON
PLAINTIFF,
6830 North Fairfax Drive
Arlington, Virginia 22213
(703) 532-1850

v.

W. MICHAEL BLUMENTHAL,
Secretary of the Treasury,
JEROME KURTZ, Commissioner of Internal Revenue, and
THE UNITED STATES OF AMERICA, DEFENDANTS

PLAINTIFF'S STATEMENT OF MATERIAL FACTS AS TO WHICH THERE IS NO GENUINE ISSUE

1. Plaintiff Taxation with Representation of Washington ("TWRW") is incorporated under the District of Columbia Non-Profit Corporation Act. Its principal office is located in Arlington, Virginia.

2. TWRW was formed on June 14, 1977, to absorb and carry forward the courtroom and legislative advocacy activities conducted by two other nonprofit organizations, Taxation with Representation ("TWR") and the Taxation with Representation Fund ("TWR Fund"). The TWR Fund was formerly known as Tax Analysts and Advocates; its name was changed on June 17, 1978 by a formal resolution adopted at the annual meeting of its board of directors.

3. The TWR Fund is classified by the Internal Revenue Service as a tax exempt charitable and educational group under section 501(c)(3) of the Code. It engages in public interest tax-related litigation and publishes a weekly journal on federal tax matters. TWR is classified by the Internal Revenue Service as a tax exempt social welfare organization under section 501(c)(4) of the Code. It is principally engaged in representing the interests of ordinary taxpayers at legislative and administrative hearings.

4. Under current law, contributions to the TWR Fund for its courtroom advocacy work are tax deductible, but contributions to TWR for its legislative advocacy are not. In addition, foundations may support the courtroom advocacy of the TWR Fund, but may not, without penalty, support the legislative advocacy of TWR.

5. The Internal Revenue Service ("IRS"), an agency of defendant United States of America, has ruled that TWRW does not qualify for exempt status under section 501(c)(3) of the Code. The IRS has rejected TWRW's request for exempt status under section 501(c)(3) of the Code solely because of TWRW's stated purpose of attempting to influence legislation.

6. On June 27, 1977, TWRW filed with the IRS a completed application for recognition of exemption under section 501(c)(3) of the Code. On October 6, 1977, the IRS requested additional information to complete its consideration of the application. This information was timely furnished to the IRS on November 1, 1977. The IRS denied recognition of exemption under section 501(c)(3) of the Code on November 25, 1977.

7. On December 13, 1977, TWRW filed a timely protest of the IRS denial and requested a conference on the exemption application with the IRS. On January 10, 1978, a conference was held between Thomas F. Field of TWRW and Edward K. Karcher of the Exempt Organizations Division of the IRS.

8. On February 14, 1978, the IRS issued a final adverse ruling denying TWRW exempt status under section 501(c)(3) of the Code.

9. If TWRW were exempt from federal income taxation under section 501(c)(3) of the Code, it would be eligible to receive contributions which would be tax-deductible to donors under sections 170(c)(2), 2055(a)(2), 2106(a)(2) and 2522 of the Code.

10. Based on the experience of TWR and the TWR Fund, the tax-deductibility of individual contributions means that they will be approximately 23 percent larger in the aggregate, than they are in the absence of tax-deductibility.

11. If TWRW were exempt from federal income taxation under section 501(c)(3) of the Code, private foundations would be entitled to provide funds for the general support of TWRW's activities without incurring tax liability under section 4945(d)(5) of the Code as a result of their contributions. In practice, foundations will not make grants to TWRW if there is any possibility of incurring section 4945 tax penalties.

12. TWRW's efforts to raise funds to support its activities are severely hampered by the IRS denial of section 501(c)(3) status.

13. TWRW would qualify for section 501(c)(3) status except for its stated purpose of attempting to influence legislation.

Respectfully submitted,

JOHN CARY SIMS
Suite 700
2000 P Street NW
Washington, D.C. 20036
[202] 785-3704

EDWARD M. QUINN
THOMAS F. FIELD
6830 North Fairfax Drive
Arlington, Virginia 22213
[703] 532-1850
Attorneys for Plaintiff

August 11, 1978

UNITED STATED DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CIVIL ACTION NO. 78–0834

TAXATION WITH REPRESENTATION OF WASHINGTON,
PLAINTIFF

v.

W. MICHAEL BLUMENTHAL, JEROME KURTZ,
THE UNITED STATES OF AMERICA, DEFENDANTS.

AFFIDAVIT

THOMAS F. FIELD, being duly sworn deposes and says as follows:

I. The Organization and Functions of TWRW

1. I am the President and chief executive officer of Taxation with Representation of Washington ("TWRW") and have held that position since TWRW was organized on June 14, 1977.

2. TWRW is a nonprofit corporation organized for charitable and educational purposes. It deals solely with federal tax issues. Its goal is to make sure that the general public is represented by skilled professionals when tax issues are under consideration in Congress, in the Executive Branch, and the courts. The tax laws are now so complex that ordinary citizens find it difficult to speak out intelligently on tax matters. TWRW seeks to ease the resulting problems by encouraging tax professionals to speak out on behalf of the general public.

3. If TWRW achieves tax exempt status, it will seek out persons who wish to represent the general public on a *pro bono* basis, including members of the tax bar, public finance economists, teachers of accounting and tax law, and other tax specialists. It will then alert them as soon as tax issues arise in their areas of expertise. It will help them to prepare and publicize testimony and to follow up their presentations with informal contacts and discussions to insure that their message is heard. Particular attention will be devoted

to administrative proceedings and to legislative hearings at which the general public is not otherwise represented.

4. Another activity of the organization will be to assist in the prosecution of tax suits in which the public interest is at stake. TWRW will retain counsel to litigate tax questions when it appears that it is in the public interest to obtain judicial review of these questions, and when it appears that those questions will otherwise not reach the courts. Suits will be selected on the basis of their possible precedential significance and their likely contribution to the improvement of the federal tax system. TWRW will comply fully with section 501(c)(3)'s ban on political activities.

5. TWRW has not made and does not plan to make, an election under sections 501(h) and 4911 of the Code. Such an election might require us to accept restrictions which are not justified or authorized under the First Amendment of the Constitution, on our right to communicate with our contributors and members regarding matters of legislative interest. Sections 501(h) and 4911 also fail to define with any narrow specificity such terms as "legislative activities" and "taxable expenditures". For this reason, an election under section 501(h) might require us to impose prior restraints on the publication of articles in our weekly tax news-magazine, Tax Notes. An election under section 501(h) might also require us to accept limitations on our legislative activities which we believe are unconstitutional and which are not imposed on similarly situated tax exempt organizations, such as, for example, trade associations, fraternal societies, labor unions, veterans organizations, and in practice, churches. In addition, the income of an organization such as Taxation with Representation of Washington normally fluctuates widely from year to year. Therefore as a practical matter, a percentage test—such as that in section 501(h)—to determine the permissable level of spending on legislative activities is unworkable.

II. TWRW'S PREDECESSOR ORGANIZATIONS

6. TWRW was incorporated on June 14, 1977 under the District of Columbia Non-Profit Corporation Act to absorb and carry forward the courtroom and legislative activities

conducted by two other non-profit corporations, Taxation with Representation (TWR) and the Taxation with Representation Fund (TWR Fund) [formerly Tax Analysts and Advocates]. I serve as executive director of both TWR and the TWR Fund.

7. TWR and the TWR Fund are separately incorporated organizations. They originated as a result of discussions in 1968 and 1969 between a group of tax attorneys and public finance economists (most of whom were then employed by the U.S. government) regarding the need for better representation of the public interest in federal tax matters. TWR is classified by the Internal Revenue Service as a tax exempt social welfare organization under section 501(c)(4) of the Internal Revenue Code ("the Code"). The TWR Fund is classified by the Internal Revenue Service as a tax exempt charitable and educational group under section 501(c)(3) of the Code.

8. In the period 1968-1969, private interest groups seeking changes in tax laws, rulings, and regulations, were regularly represented in formal and informal hearings before Congress, the Internal Revenue Service, and the Department of the Treasury. In addition, such groups were generally able to challenge adverse administrative determinations in the courts. In 1968-1969, there was no comparable public interest representation in connection with federal tax matters.

9. It was clear during these preliminary discussions in 1968 and 1969 that some of the activities needed to insure better public interest representation in tax matters could be performed by a charitable and educational group which would be eligible for foundation support and qualified to receive tax deductible contributions. Among these functions were (a) providing timely, accurate information to the news media and tax practitioners and (b) representing the public interest before the courts. Accordingly, the TWR Fund was organized to perform these functions.

10. It also seemed apparent during these preliminary discussions that representation of the public interest before Congress was not an activity that could be performed, under existing federal tax law, by a charitable and educational

group eligible for foundation support and qualified to receive deductible charitable contributions. Accordingly, a separate charitable and educational group, Taxation with Representation, was formed to represent the public interest at legislative hearings on tax matters.

11. Although formed to serve the same basic goal—better representation of the public interest in federal tax matters—as a result of the requirements of the Code, TWR and the TWR Fund:

a. were separately incorporated
b. maintain separate books and bank accounts
c. file separate tax returns and annual reports, and
d. derive their funds from separate sources.

12. Both TWR and the TWR Fund are financed through public contributions. Yet, under current law, contributions to the TWR Fund for its courtroom advocacy work are tax deductible, but contributions to TWR for its legislative activities are not. As a result, contributions to TWR from the public average approximately 23 percent less per contributor than contributions to the TWR Fund. In addition, foundations may support the courtroom advocacy of the TWR Fund but may not, without penalty, support the legislative advocacy of TWR.

III. THE FORMATION OF TWRW

13. The continued maintenance of two separate organizations to express a single charitable goal imposes heavy costs on both organizations and wastes scarce charitable funds. An undesired and artificial division of activities between TWR and the TWR Fund, with all the inefficiencies which naturally flow from such an arrangement, was forced upon our organizations, even though a single entity would undoubtedly promote the exempt purposes better.

14. These heavy expenses and duplication of effort would be eliminated if the charitable functions of these two groups could be united in a single organization. For that reason, Taxation with Representation of Washington was formed. TWRW is designed to absorb the public interest law firm function of the TWR Fund (consisting primarily of courtroom litigation and the representation of ordinary taxpay-

ers at administrative hearings before the IRS) and the public interest lobbying functions of TWR (consisting largely of representation of ordinary taxpayers at legislative hearings before Congress).

15. After incorporation, TWRW filed with the Internal Revenue Service a completed application for exemption under section 501(c)(3) of the Code. At the request of the IRS, additional information was furnished to allow the IRS to complete its consideration of the application. On November 25, 1977, the IRS rejected TWRW's application, finding that a substantial portion of the organization's activities might be devoted to legislative advocacy. TWRW then filed a timely protest of this denial, and a conference was held with the IRS. On February 14, 1978, the IRS issued a final adverse ruling as to TWRW's exempt status under section 501(c)(3) on the ground that legislative advocacy might constitute a substantial portion of the organization's activities.

16. If TWRW were exempt from federal income tax under section 501(c)(3) of the Code, it would be eligible to receive contributions which would be tax-deductible to donors. Based on the experience of TWRF and TWR, this means that individual contributions would be approximately 23 percent greater than otherwise. In addition, private foundations would be entitled to provide funds for the general support of TWRW's activities without incurring tax liability under section 4945(d)(5) of the Code as a result of their contributions. As a practical matter, foundations cannot support TWRW's activities at all, and other taxpayers are much less likely to make a non-tax-deductible contribution than they would be to make a tax-deductible one, since the after tax cost of a contribution to the donor is significantly affected by tax deductibility.

17. The character of the proposed activities of Taxation with Representation of Washington can be gauged by an examination of the existing activities of Taxation with Representation and the Taxation with Representation Fund.

IV. THE ACTIVITIES OF TAXATION WITH REPRESENTATION

18. Taxation with Representation was incorporated as a public interest taxpayers' lobby on July 14, 1970, pursuant to the District of Columbia Non-Profit Corporation Act.

The group's articles of incorporation state that Taxation with Representation is designed:

> To promote the common good and general welfare of the people of the United States by appearing on behalf of the public at legislative and administrative hearings on Federal tax matters and by assisting members of the academic community in presenting their views at such hearings.

19. Taxation with Representation does not support any political party or candidate, nor does it participate in political campaigns. It concentrates on helping public spirited tax professionals express their own views on federal tax questions. Beginning in 1975, TWR expanded its legislative activities by taking positions on legislation in its own name in addition to assisting others who were doing so. The group's work is in all respects charitable and educational, and—but for the fact that the group comments on legislation—it would undoubtedly qualify for charitable and educational status within the scope of section 501(c)(3) of the Code.

20. Membership dues and contributions constitute substantially all of Taxation with Representation's receipts, aside from minor amounts received sporadically from the sale of publications. The group now has approximately 6,000 members drawn from a wide cross section of the public.

21. TWR's staff consists of Thomas F. Field, Executive Director; Thomas J. Reese, Legislative Director; and Howard J. Hoffman, Staff Writer. All contribute their services without compensation. The group's current budget calls for legislative activity expenditures of approximately $25,000 during the fiscal year ending June 30, 1979.

22. In seeking to represent the public interest before Congress, TWR has attempted to influence legislation which was opposed to the interests of the following groups, among others:

— corporations and other business entities which may, for federal income tax purposes, deduct lobbying expenses (other than grass-roots appeals to the general public) whenever legislation has a direct relationship to their business interests;

— tax exempt trade associations, chambers of commerce and similar organizations, payments to which are deductible even when they are attributable to lobbying, if the issue is directly related to the members' business interests;
— tax-exempt labor and agricultural organizations, payments to which are deductible even when they are attributable to lobbying, if the issue is related to the members' business interests;
— veterans organizations, contributions to which are tax-deductible under Code sections 170, 2055, and 2522 without regard to the extent of the lobbying in which the organization is engaged;
— fraternal societies, contributions to which are tax-deductible under Code sections 170 and 2522 without regard to the extent of the lobbying in which the organization is engaged.

Because of fund raising difficulties because contributions to TWR are not tax-deductible to donors, the above-listed organizations can almost invariably afford to spend much more in presenting their points of view on tax legislation than can TWR.

23. Taxation with Representation's financial difficulties are primarily attributable to the fact that it is not qualified to receive tax deductible charitable contributions. Nondeductibility for federal tax purposes of contributions means that the net after-tax cost of a contribution to TWR is greater than the net after-tax cost of an identical amount to a private interest lobby serving the payor's business or other interests. In addition, the nondeductibility of contributions means that potential members are wary about joining Taxation with Representation, since the deductibility of contributions has come to be regarded by many individuals as a government seal of approval for charitable groups.

V. THE ACTIVITIES OF THE TAXATION WITH REPRESENTATION FUND

24. The Taxation with Representation Fund was incorporated as Tax Analysts and Advocates, a charitable and educational group, on July 14, 1970, pursuant to the District of

Columbia Nonprofit Corporation Act. The group's name was changed to the Taxation with Representation Fund on June 17, 1978.

25. The group's articles of incorporation state that the Taxation with Representation Fund is designed:

> To improve the understanding of the Federal tax system by insuring that the press has access to timely, accurate, impartial information regarding Federal tax matters, including the results of scholarly work by tax lawyers, economists, and accountants.

26. Thus, the activities of the TWR Fund have a dual purpose: to make specialized tax information service available to the news media and tax practitioners through its weekly publication *Tax Notes* and to promote the public interest in tax matters through legal activity, including litigation.

27. The TWR Fund has attracted considerable financial support, about 60 percent of which has been in the form of foundation grants and most of the remainder of which has consisted of donations and publishing receipts. The group's current budget calls for expenditures of approximately $200,000 during the fiscal year ending June 30, 1979. The ability to raise funds of this magnitude from a variety of donors, including the foundation community, is directly attributable to the organization's status as a charitable and educational group within the meaning of section 501(c)(3) of the Code and its consequent qualification to receive contributions which are tax-deductible under section 170 of the Code.

28. When conducting its charitable and educational activities in the federal tax area, the TWR Fund expresses viewpoints opposed by the following groups, among others:

> — trade associations, chambers of commerce, and similar business associations, payments to which provide tax deductions to the payors or contributors under the provisions of section 162 of the Code, and which are free to carry on unlimited legislative activities (other than grassroots appeals to the general public) whenever legislation has a direct relationship to the payor's or contributor's business interests;

— labor and agricultural organizations, dues and contributions to which provide tax deductions to the payors or contributors under the provisions of section 162 of the Code, and which are free to carry on unlimited legislative activities (other than grassroots appeals to the general public);
— veterans organizations, contributions to which provide tax deductions to the contributors under sections 170, 2055, and 2522 of the Code, and which are free to use these contributions, without limit, for legislative activities, and
— fraternal beneficiary societies, contributions to which provide tax deductions to the contributors under sections 170, and 2522 of the Code, and which are free to use these contributions, without limit, for legislative activities, provided that they do not make themselves subject to the Code's restrictions on legislative activities by accepting a bequest which is deductible under sections 2055 and 2106 of the Code.

29. Since the federal tax law is so overwhelmingly statutory in nature, a group seeking to serve the general public interest in federal tax matters is at a grave disadvantage if it is prevented from speaking out freely on legislative proposals. The TWR Fund is prevented from pursuing its charitable goals in the legislative arena by the restrictions in section 501(c)(3) of the Code. Despite these problems, the TWR Fund has sought to comply with section 501(c)(3) in all respects.

30. These restrictions gravely hamper the TWR Fund by making it impossible to bring the group's professional resources to bear during the critical period when tax rules are being formulated in Congress. In contrast, other tax exempt groups that enjoy the benefit of tax deductibility for their receipts are not subject to similar restrictions on their participation in Congressional hearings and debates.

VI. EXHIBITS

31. Attached hereto and marked exhibits A, B, and C, respectively, are true and correct copies of the following documents:

A. TWRW's Articles of Incorporation.
B. TWRW's Application for Exemption under Section 501(c)(3).
C. The Final Internal Revenue Service Ruling Rejecting TWRW's Application for Exemption.

VII. CONCLUSION

32. TWR and the TWR Fund are dual expressions of a common charitable impulse. The fields of interest of the two organizations—federal tax policy and its effects—are also identical. The purposes and operations of the organizations differ only in that TWR attempts to influence legislation while the TWR Fund does not. By seeking to combine the legislative and courtroom advocacy activities of these two groups, we have sought to lessen the heavy costs on both groups and to avoid waste of scarce charitable funds.

/s/_____
THOMAS F. FIELD

State of Virginia)
County of Arlington) SS

Subscribed and sworn to before me, a notary public, this ___ day of ___, 1978.

_____
NOTARY PUBLIC

MY COMMISSION EXPIRES:

OFFICE OF RECORDER OF DEEDS, D.C.
Corporation Division
Sixth and D Streets, N.W.
Washington, D.C. 20001

CERTIFICATE

THIS IS TO CERTIFY that all provisions of the District of Columbia Non-profit Corporation Act have been complied with and ACCORDINGLY this Certificate of Incorporation is hereby issued to the TAXATION WITH REPRESENTATION OF WASHINGTON as of the date hereinafter mentioned.

Date June 14, 1977

PETER S. RIDLEY,
Recorder of Deeds, D.C.

/s/ _____

DAVID H. COLE
Superintendent of Corporations

Government of the District of Columbia *J-0129-75*
Form RD-C 55
Oct. 1962

OFFICE OF RECORDER OF DEEDS
CORPORATION DIVISION
WASHINGTON

THIS IS TO CERTIFY *that the pages attached hereto constitute a full, true, and complete copy of* certificate and articles of incorporation of Taxation With Representation of Washington, as received and filed June 14, 1977.

As the same appears of record in this office.

In Testimony Whereof,
I have hereunto set my hand and caused the seal of this office to be affixed, this the 20th day of June A.D. 1977

PETER S. RIDLEY,
Recorder of Deeds, D.C.

/s/ _____
DAVID H. COLE
Superintendent of Corporations, D.C.

P-3644

ARTICLES OF INCORPORATION
OF
TAXATION WITH REPRESENTATION OF WASHINGTON

Pursuant to the District of Columbia
Nonprofit Corporation Act

* * * * *

To: The Recorder of Deeds
District of Columbia
Washington, D.C.

We, the undersigned natural persons of the age of twenty-one years or more, acting as incorporators of a corporation, adopt the following Articles of Incorporation for such corporation pursuant to the District of Columbia Nonprofit Corporation Act:

FIRST: *Name.* The name of the corporation is TAXATION WITH REPRESENTATION OF WASHINGTON.

SECOND: *Duration.* The corporation's period of existence is perpetual.

THIRD: *Purposes and Powers.* (a) The purposes for which the corporation is organized and shall operate are as follows:

> To promote charitable activities within the meaning of Section 501(c)(3) of the Internal Revenue Code of 1954 (or the corresponding provisions of any future United States Internal Revenue Law) and the regulations pertaining thereto as they now exist or may hereafter be amended.

(b) In pursuance of its purposes, the corporation is authorized and empowered to do any and all lawful acts and things consistent therewith including, but without limitation:

> Relief of the poor, the distressed, and the underprivileged; and the defense of human and civil rights secured by law; through representation of the broad public interest in the courts and in Congress.

(c) In pursuance of the foregoing purposes, as limited, and for no others, the corporation shall have power:

(1) To receive, administer, maintain, use and employ funds and property, real and personal, exclusively for the promotion of charitable purposes.
(2) To accept, acquire, receive, take, hold by bequest or devise, grant, donate, purchase, exchange, lease, and transfer (by judicial order of decree or otherwise) any property, both real and personal, of whatever kind, nature, or description and wherever situated;
(3) To improve, sell, exchange, convey, mortgage, lease, transfer, or otherwise dispose of any such property, both real and personal, as the objects and purposes of the corporation may require, subject to such limitations as may be prescribed by law;
(4) To borrow money, and, from time to time, to make, accept, endorse, execute, and issue bonds, debentures, promissory notes, bills of exchange, and other obligations of the corporation for moneys borrowed or in payment for property acquired or for any of the other purposes of the corporation, and to secure the payment of any such obligations by mortgage, pledge, deed, indenture, agreement, or other instrument of trust, or by any other lien upon, assignment of, or agreement in regard to all or any part of the property, rights, or provisions of the corporation wherever situated, whether now owned or hereafter to be acquired;
(5) To invest and reinvest its funds in such partnership interests, stock (common or preferred), bonds, debentures, mortgages, or in such other associations, securities and property as its Board of Directors shall deem advisable, subject to the limitations and conditions contained in any bequest, devise, grant, or gift (provided that such limitations and conditions are not in conflict with the purposes of the corporation);
(6) To have offices and to promote and carry out its objects and purposes in the District of Columbia, in the states and possessions of the United States, and in foreign countries.
(7) To enter into, make, perform and carry out any contracts or agreements in furtherance of any of its objects and purposes, without limit as to amount, with any person, firm, committee, association or corporation, in any part of the world; and
(8) In general, and subject to such limitations and conditions as are or may be prescribed by law, to exercise

such other powers which now are or hereafter may be conferred by law upon a corporation organized for the purposes set forth above, or necessary or incidental to the powers so conferred, or conducive to the attainment of the objects and purposes of the corporation.

(d) The foregoing purposes and powers are each and all subject to the following additional limitations:

(1) This corporation is a nonprofit corporation organized without capital stock;

(2) No part of the net earnings of the corporation shall inure to the benefit of any director or officer of the corporation, or any private individual (except that reasonable compensation may be paid for services rendered to the corporation in the course of effecting one or more of its purposes), and no director or officer of the corporation, or any private individual shall be entitled to share in the distribution of any of the corporate assets on dissolution of the corporation;

(3) The corporation shall not participate in, or intervene in (including the publishing or distributing of statements) any political campaigns on behalf of or in opposition to any candidate for public office, nor shall it operate a social club for the benefit of its members or carry on business with the general public in a manner similar to organizations operated for profit; and

(4) Notwithstanding any other provision of these articles, the corporation shall not conduct or carry on any activities not permitted to be conducted or carried on by an organization exempt under Section 501(c)(3) of the Internal Revenue Code of 1954 (or the corresponding provisions of any future United States Internal Revenue Law) and the regulations pertaining thereto as they now exist or may hereafter be amended. However, to the extent that any provision of Section 501(c)(3) of the Internal Revenue Code violates the provisions of the United States Constitution, the corporation shall not be required to abide by such unconstitutional provision.

FOURTH: *Members.* The corporation shall have members. The membership of the corporation may be divided

into such classes as shall be provided for in the By-Laws, but no member shall have the right to vote.

FIFTH: *Directors.* (a) The corporation shall be controlled by a Board of Directors who shall have the sole voting power and shall have all of the authority of the corporation and may take any action permitted by the District of Columbia Nonprofit Corporation Act.

(b) The Board of Directors of the corporation shall be elected annually by the directors then in office, at the time and in the manner provided in the By-Laws of the corporation.

(c) Vacancies arising in the Board of Directors from any cause whatever, including death, resignation and any increase in the number of directors, shall be filled by the remaining directors then in office, even though less than a quorum.

(d) All matters pertaining to directors, including resignation, change of number and filling of vacancies, shall be regulated by the By-laws to the extent that provision therefore is not made herein.

SIXTH: *Internal Affairs.* (a) To the extent not set forth herein, the internal affairs of the corporation shall be regulated by its Board of Directors in accordance with the By-Laws.

(b) No directorship or officership in this corporation shall be assignable inter vivos, nor shall any directorship, or officership in this corporation pass to any personal representative, heir, or devisee.

(c) The private property of the directors and officers of the corporation shall not be subject to payment of the corporate debts to any extent whatsoever.

SEVENTH: *Dissolution.* Upon the liquidation, dissolution and winding up of the business and affairs of the corporation, the Board of Directors shall pay or make provision for the payment of all liabilities of the corporation. The corporation's remaining assets shall then be distributed, as the Board of Directors shall determine, exclusively to one or more charitable, scientific, literary, or educational organizations described in Section 170(b)(1)(A) of the Internal Revenue Code of 1954 (other than clauses (vii) and (viii)

thereof), each of which has been in existence and so described for a continuous period of at least 60 calendar months. Any remaining assets not so disposed of by the Board of Directors shall be distributed by the United States District Court for the District of Columbia exclusively to one or more organizations of the type described in the preceding sentence.

EIGHTH: *Address and Agent.* The address of the initial registered office of the corporation is Apartment 623, 1225 New Hampshire Avenue, N.W., Washington, D.C. 20036, and the name of its initial registered agent at such address is John F. Winslow.

NINTH: *Initial Directors.* The number of directors constituting the initial Board of Directors is 3 and the names and addresses of the persons who are to serve as the initial directors until the first annual meeting or until their successors shall be elected and qualify are:

THOMAS F. FIELD
2369 North Taylor Street
Arlington, Virginia 22207

THOMAS J. REESE
1225 Otis Street, N.E.
Washington, D.C. 20017

EDWARD M. QUINN
8 Alden Place
Hartsdale, New York 10530

TENTH: Incorporators. The name and address of each incorporator is:

MARY ANN MILLER
844 S Frederick St.
Arlington Va 22204

MARY E. NISSEN
6238 Washington Blvd.
Arlington Va. 22205

illegible

Date:_____
STATE OF VIRGINIA SS
COUNTY OF ARLINGTON

I, _____, a Notary Public, hereby certify that on the ____ day of ____, 1977, personally appeared before me _____ and _____, who signed the foregoing document as incorporators, and acknowledged the same as their deed and act.

/s/ ob_____
Notary Public

Form **1023**
(Rev. November 1972)
Department of the Treasury
Internal Revenue Service

Application for Recognition of Exemption
Under Section 501(c)(3) of the Internal Revenue Code

To be filed in the District in which the organization has its principal office or place of business.

This application, when properly completed, shall constitute the notice required under section 508(a) of the Internal Revenue Code in order that organizations may be treated as described in section 501(c)(3) of the code, and the notice under section 508(b) appropriate to those organizations claiming not to be private foundations within the meaning of section 509(a).

Part I.—Identification (See instructions)

1 Full name of organization	2 Employer identification number (If none, attach Form SS-4)
TAXATION WITH REPRESENTATION OF WASHINGTON	Form SS-4 Attached

3(a) Address (number and street)
2369 N. Taylor Street

3(b) City or town, State and ZIP code	4 Name and phone number of person to be contacted
Arlington, Va. 22207	Thomas V. Field (703) 522-1800

5 Month the annual accounting period ends	6 Date incorporated or formed	7 Activity Codes (see instructions)		
June 30	June 14, 1977	430	460	480

Part II.—Organizational Documents (See instructions)

1 Attach a conformed copy of the organization's creating instruments (articles of incorporation, constitution, articles of association, deed of trust, etc.). Copy attached

2 Attach a conformed copy of the organization's by-laws or other rules for its operation. Copy attached

3 If the organization does not have a creating instrument, check here (See instructions) . . . . . ☐

Part III.—Activities and Operational Information (See instructions)

1 What are or will be the organization's sources of financial support? List in order of magnitude. If a portion of the receipts is or will be derived from the earnings of patents, copyrights, or other assets (excluding stock, bonds, etc.), identify such item as a separate source of receipt. Attach representative copies of solicitations for financial support.

Taxation with Representation of Washington's sources of support will be in the form of contributions from members, from the tax bar and from the general public.

No materials have as yet been prepared for purposes of soliciting funds.

2 Describe the organization's fund-raising program and explain to what extent it has been put into effect. (Include details of fund-raising activities such as selective mailings, formation of fund raising committees, use of professional fund raisers, etc.)

Taxation with Representation of Washington has not yet engaged in any fund raising activities. Any work involved in a fund raising campaign will be handled on a volunteer basis. No fund raising committees have been formed, nor does Taxation with Representation of Washington intend to use professional fund raisers or enter into any fund raising agreement.

I declare under the penalties of perjury that I am authorized to sign this application on behalf of the above organization and I have examined this application, including the accompanying statements, and to the best of my knowledge it is true, correct and complete.

Thomas V. Field — President — June 27, 1977
(Signature) (Title or authority of signer) (Date)

Part III.—Activities and Operation Information (Continued)

3 Give a narrative description of the activities presently carried on by the organization, and also those that will be carried on. If the organization is not fully operational, explain what stage of development its activities have reached, what further steps remain for the organization to become fully operational, and when such further steps will take place. The narrative should specifically identify the services performed or to be performed by the organization. (Do not state the purposes of the organization in general terms or repeat the language of the organizational documents.) If the organization is a school, hospital, or medical research organization, include sufficient information in your description to clearly show that the organization meets the definition of that particular activity that is contained in the instructions for Part VII–A on page 3 of the instructions.

Taxation with Representation of Washington (TWRW) is a public interest organization that deals solely with federal tax issues. Its goal is to make sure that the general public is represented by skilled professionals when tax issues are under discussion in Congress, in the Executive Branch or before the courts.

The tax laws are now so complex that ordinary citizens find it difficult to speak out intelligently on tax matters. TWRW seeks to ease the resulting problems by encouraging tax professionals to speak out on behalf of the public.

TWRW seeks out persons who wish to represent the general public, including members of the tax bar, public finance economists, teachers of accounting and tax law and other tax specialists. It alerts them as soon as tax issues arise in their areas of expertise. It then helps them to prepare and publicize testimony and to follow up their presentation with informal contacts and discussions to insure that their message is heard. Particular attention is devoted to administrative proceedings and to legislative hearings at which the general public is not otherwise represented.

Another activity of the organization is to assist in the prosecution of tax suits in which the public interest is at stake. TWRW retains counsel to litigate tax questions when it appears that it is in the public interest to obtain judicial resolution of these questions, and when it appears that those questions will otherwise not reach the courts. Suits are selected on the basis of their possible precedential significance and their likely contribution to improvement of the federal tax system.

TWRW has not yet undertaken any litigation.

Part III.—Activities and Operational Information (Continued)

4 The membership of the organization's governing body is:

(a) Names, addresses, and duties of officers, directors, trustees, etc.	(b) Specialized knowledge, training, expertise, or particular qualifications
Thomas F. Field, President, 2369 North Taylor Street, Arlington, Va. 22207 Mary Ann Miller, Treasurer, 844 S. Frederick Street, Apt. 242-A, Arlington, Va. 22204 Shirley Grossman, Secretary, 2023 Rhode Island Avenue, McLean Va. 22101	Attorney

(c) Do any of the above persons serve as members of the governing body by reason of being public officials or being appointed by public officials? ☐ Yes ☒ No

If "Yes," please name such persons and explain the basis of their selection or appointment.

(d) Are any members of the organization's governing body "disqualified persons" with respect to the organization (other than by reason of being a member of the governing body) or do any of the members have either a business or family relationship with "disqualified persons"? (See specific instructions 4(d).) ☐ Yes ☒ No

If "Yes," please explain.

5 Does the organization control or is it controlled by any other organization? ☐ Yes ☒ No

Is the organization the outgrowth of another organization, or does it have a special relationship to another organization by reason of interlocking directorates or other factors? ☒ Yes ☐ No

If either of these questions is answered "Yes," please explain.

TWRW is designed as the successor to two separate organizations: Taxation with Representation and Tax Analysts and Acvocates. Both organizations were formed under the District of Columbia Non-Profit Corporation Act. The purpose of TWRW is to assume and continue the existing court and congressional advocacy functions of TWR and TA/A.

6 Is the organization financially accountable to any other organization? ☐ Yes ☒ No

If "Yes," please explain and identify the other organization. Include details concerning accountability or attach copies of reports if any have been rendered.

7 What assets does the organization have that are used in the performance of its exempt function? (Do not include income producing property.) If any assets are not fully operational, explain what stage of completion has been reached, what additional steps remain to be completed, and when such final steps will be taken.

None. Fund raising will be commenced when our exemption application is approved.

Part III.—Activities and Operatio nformation (Continued)

8 (a) What benefits, services, or products will the organization provide with respect to its exempt function?

TWRW will represent the public interest before the Congress, the Executive Branch and the courts. TWRW will assist in preparing testimony to be used before administrative and legislative hearings. TWRW also assists in preparing litigation.

(b) Have the recipients been required or will they be required to pay for the organization's benefits, services, or products? . . . . . ☐ Yes ☒ No

If "Yes," please explain and show how the charges are determined.

9 Does or will the organization limit its benefits, services or products to specific classes of individuals? . . . ☐ Yes ☒ No

If "Yes," please explain how the recipients or beneficiaries are or will be selected.

10 Is the organization a membership organization? . . . . . ☒ Yes ☐ No

If "Yes," complete the following:

(a) Please describe the organization's membership requirements and attach a schedule of membership fees and dues.

See attached schedule

(b) Are benefits limited to members? . . . . . ☐ Yes ☒ No

If "No," please explain.

(c) Attach a copy of the descriptive literature or promotional material used to attract members to the organization. No such material has been prepared.

11 Does or will the organization engage in activities tending to influence legislation or intervene in any way in political campaigns? . . . . . ☒ Yes ☐ No

If "Yes," please explain.

TWRW will not seek to intervene in political campaigns. TWRW seeks to make sure that the public interest in federal tax questions is represented before Congress. TWRW will assist skilled professionals in testifying before Congress and at administrative hearings.

Part IV.—Statement as to Private Foundation Status (See instructions)

1 Is the organization a private foundation? . . . . . ☐ Yes ☒ No

2 If question 1 is answered "No," indicate the type of ruling being requested as to the organization's status under section 509 by checking the applicable box below:

☐ Definitive ruling under section 509(a)(1), (2), (3), or (4) — complete Part VII.

☒ Advance or extended advance ruling under section 509(a)(1) or (2) — See instructions.

3 If question 1 is an answered "Yes," and the organization claims to be a private operating foundation, check here ☐ and complete Part VIII.

PAGE 4A - Answer to question 10a, Part III, Form 1023

Membership Schedule for
TWRW

The membership of Taxation with Representation of Washington is divided into three classes: National Committee Members, Consultant Members, and Sustaining Members. National Committee membership is extended by the Board of Directors of the Corporation to distinguished persons who are willing to permit the use of their names in connection with the corporation's activities. Consultant membership is extended to persons who are willing to advise the corporation regarding the conduct of its affairs. Sustaining membership is granted to those who contribute funds or services to the corporation. By making a contribution, however small, anyone may therefore become a member of the corporation. No members have the right to vote.

SCHEDULE F.—Litigating anizations (Public Interest Law Firms ' Similar Organizations)

1 Will the organization conform to the guidelines for organizations engaged in litigation activities issued by the Internal Revenue Service in Rev. Proc. 71-39, C.B. 1971-2, 575? ☒ Yes ☐ No

If "No," please explain.

2 What is the organization's area of public interest or concern?

TWRW's area of public concern is in the field of tax law where it seeks to represent the public interest in the courts and before Congress.

3 Is the organization set up primarily to try the case of a particular person or prosecute a particular cause of action? ☐ Yes ☒ No

If "Yes," please explain.

4 What are the organization's criteria for selection of cases? TWRW shall not conduct any litigation unless such litigation (1) can reasonably be said to be in representation of a broad public interest rather than a private interest and (2) is designed to present a position on behalf of the public at large on matters of public interest.

5 In what cases has the organization started legal proceedings and in what other cases is it preparing to start proceedings? Please describe the legal issues with respect to each case and explain how they relate to the organization's area of concern.

None. The predecessor organization, Tax Analysts and Advocates, however, has litigated suits which have been described in detail in its annual information returns.

6 (a) Composition of the organization's board of directors or trustees

Name and address	Business or Occupation
Thomas F. Field 2369 North Taylor St. Arlington Va. 22207	Attorney
Thomas J. Reese 1225 Otis St. NE. Washington DC 20017	Political Scientist
Edward M. Quinn 8 Alden Pl., Hartsdale NY 10530	Attorney

(b) Will any of the attorneys hired by the organizations be a trustee or member of the board of directors of the organization or be associated in the practice of law with any such trustee or member? ☐ Yes ☒ No

If "Yes," please explain.

7 Does or will the organization share office space with a private law firm? ☐ Yes ☒ No

If "Yes," please explain.

8 Does or will the organization receive fees for its professional services? ☒ Yes ☐ No

If "Yes," please explain.

TWRW shall not accept fees for its services except in accordance with procedures approved by the Internal Revenue Service. In general, the organization does not expect that its litigation will produce fees.

INTERNAL REVENUE SERVICE
Washington, D.C. 20224
Date: Feb ____ 1978

DEPARTMENT OF THE TREASURY
Employer Identification Number:
Form Number: 1120
Tax Years: 1978
Person to Contact: Edward Karcher
Contact Telephone Number: (202) 566-3201

Taxation with Representation
of Washington
2369 North Taylor Street
Arlington, Virginia 22207

Dear Taxpayer:

This is a final adverse ruling as to your exempt status under section 501(c)(3) of the Internal Revenue Code.

Our adverse ruling was made for the following reason(s): You are not organized or operated exclusively for one or more exempt purposes within the meaning of section 501(c)(3) of the Code, since your stated purposes include attempting to influence legislation, and legislative advocacy may constitute a substantial part of your activities.

Contributions to your organization are not deductible under Code section 170.

You are required to file Federal income tax returns on the above form. Based on the financial information you furnished, it appears that returns should be filed for the years shown above. These returns should be filed with your key District Director for exempt organization matters within 30 days from the date of this letter unless a request for an extension of time is granted. Processing of income tax returns and assessment of any taxes due will not be delayed because a petition for declaratory judgment has been filed under Code section 7428. Returns for subsequent tax years should be filed with the appropriate service center indicated in the instructions for those returns.

If you decide to contest this ruling under the declaratory

judgment provisions of section 7428 of the Code, a petition to the United States Tax Court, the United States Court of Claims, or the United States District Court for the District of Columbia must be filed within 90 days from the date this ruling was mailed to you. Contact the clerk of the appropriate court for rules for filing petitions for declaratory judgment.

In accordance with section 6104(c) of the Code, the appropriate State officials will be notified of this action.

If you have any questions, please contact the person whose name and telephone number are shown in the heading of this letter.

Thank you for your cooperation.

Sincerely yours,

/s/ _____

E.D. COLEMAN
Chief, Exempt Organizations
Technical Branch

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

CIVIL ACTION NO. 78–0834

TAXATION WITH REPRESENTATION OF WASHINGTON, PLAINTIFF

v.

W. MICHAEL BLUMENTHAL, ET AL., DEFENDANTS

DEFENDANTS' STATEMENT OF MATERIAL FACTS NOT GENUINELY IN DISPUTE

Pursuant to Rule 1-9(e) of the Rules of this Court, defendants hereby state the material facts which they believe are not genuinely in dispute in this action.

1. Plaintiff, Taxation with Representation of Washington, is an organization, one of whose primary purposes is to engage in substantial lobbying within the meaning of Sections 501(c)(3) and 501(h) of the Internal Revenue Code of 1954 ("the Code"), as amended, 26 U.S.C., Sections 501(c)(3) and 501(h).

2. On February 14, 1978, the Internal Revenue Service issued a final adverse determination in response to plaintiff's administrative application for recognition of initial qualification as an organization organized and operated exclusively for exempt purposes within the meaning of that section.

3. The sole ground for this adverse ruling is plaintiff's refusal to comply with the express statutory requirement of Section 501(c)(3) that organizations exempt under that section may not engage in substantial lobbying.

4. Plaintiff has exhausted its administrative remedies.

Respectfully submitted,

/s/ _____

JOHN J. MCCARTHY
DONALD J. GAVIN
JOHN M. CUNNINGHAM
Attorneys
Tax Division
Department of Justice
Washington, D.C. 20530
Telephone: (202) 739-2509

Of Counsel:

EARL J. SILBERT
United States Attorney
for the District of Columbia

IN THE UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF COLUMBIA

Civil Action No. 78-0834

TAXATION WITH REPRESENTATION OF WASHINGTON, PLAINTIFF,

v.

W. MICHAEL BLUMENTHAL, ET AL., DEFENDANTS.

PLAINTIFF'S RESPONSE TO DEFENDANTS' STATEMENT OF MATERIAL FACTS NOT GENUINELY IN DISPUTE.

Pursuant to Rule 1–9(e) of the Rules of this Court, plaintiff notes that defendants have not objected or otherwise responded to its statement of material facts not genuinely in dispute, filed August 11, 1978, and responds as follows to the defendants' statement of material facts not genuinely in dispute, filed on October 16, 1978:

1. Admits, provided that the term "substantial lobbying" as used by the defendants is understood to refer solely to legislative advocacy intended to advance charitable goals.

2. Admits.

3. Admits.

4. Admits.

Respectfully submitted,

/s/_____

JOHN CARY SIMS
Suite 700
2000 P Street, N.W.
Washington, D.C. 20036
(202) 785-3704

THOMAS F. FIELD

EDWARD M. QUINN
6830 North Fairfax Drive
Arlington, Virginia 22213
(703) 532-1850
Attorneys for Plaintiff

October 24, 1978

APPENDIX A

The Taxation with Representation Fund's Public Charity Ruling under Internal Revenue Code Section 509(a)(2)

DEPARTMENT OF THE TREASURY
DISTRICT DIRECTOR
INTERNAL REVENUE SERVICE

March 22, 1973

Tax Analysts and Advocates, Inc.
2369 North Taylor Street
Arlington, Virginia 22207

Gentlemen:

This modifies our letter of September 24, 1971 in which we stated you would be treated for your first two tax years as an organization which is not a private foundation.

Based on additional information supplied, we have determined you are not a private foundation within the meaning of section 509(a) of the Internal Revenue Code, because you are an organization described in section 509(a)(2).

If your sources of support, or your purposes, character, or method of operation is changed, you must let us know so we can consider the effect of the change on your status.

Sincerely yours,

/s/_____

WILLIAM D. WATERS
District Director

APPENDIX C

Petition by the Editors of *Tax Notes* Magazine Requesting Permission to Publish an Editorial Page, and Response of the Commissioner of Internal Revenue Thereto

TAX ANALYSTS AND ADVOCATES

732 Seventeenth Street, N.W.,
Washington, D.C. 20006
(202) 298-5556

Commissioner of Internal Revenue
Washington, D.C. 20224
Attention: CC:LR:T
November 7, 1975

Dear Sir,

This petition is submitted pursuant to Section 601.601(c) of the Statement of Procedural Rules, 26 C.F.R. Part 601. It requests an amendment of Section 1.501(c)(3) of the Treasury Regulations on Income Tax, relating to the definition of an "action organization". The requested amendment would make it clear that publication of an editorial expressing views on legislative issues in a newspaper published by a charitable and educational organization will not cause the organization to be classified as an "action organization" or subject it to other sanctions under the Internal Revenue Code.

Tax Analysts and Advocates has been ruled to be a public charity under the provisions of Sections 501(c)(3) and 509(a)(2) of the Internal Revenue Code. It publishes a weekly newspaper, Tax Notes, which is designed to assist newspaper reporters and editors throughout the U.S. to understand and report federal tax issues. The goal is to assist newsmen to understand and report tax issues more clearly, so that the public, in turn, will be better informed.

As a result of the restrictions set forth in Section 1.501(c)(3) of the Treasury Regulations on Income Tax, and the related regulations, Tax Analysts and Advocates has

never published an editorial in Tax Notes, and it refrains from publishing any other statement of its opinions on tax issues arising in a legislative context for fear that such publication would result in loss of its tax exempt status under Section 501(c)(3) of the Internal Revenue Code.

Tax Analysts and Advocates believes that the existing regulations abridge rights guaranteed by the First Amendment to the Constitution, because they exert a chilling effect on the exercise of free speech, because they are impermissibly vague, and because they result in prepublication censorship. Accordingly, an amendment to these regulations is requested, which will remove the bars to the expression of editorial opinion in our newspaper, Tax Notes, including, *inter alia*, opinion with respect to the merits of pending legislation.

Best regards,

/s/ _____

THOMAS F. FIELD
Executive Director

Internal Revenue Service
Department of the Treasury
Washington, D.C. 20224

Jan. 2, 1976

Mr. Thomas F. Field
Executive Director
Tax Analysts and Advocates
732 Seventeenth St., N.W.
Washington, D.C. 20006

Dear Mr. Field:

This is in response to your letters of November 7 and December 10, requesting amendment of the income tax regulations under section 1.501(c)(3). You requested that the regulations dealing with the definition of an "action organization" be amended to allow a section 501(c)(3) organization to publish editorial opinions on legislative issues in a newspaper published by such organization without jeopardizing its section 501(c)(3) exception.

As you are undoubtedly aware, the present regulations under section 501(c)(3) do not prohibit editorializing *per se*. For example, section 1.501(c)(3)-1(d)(2) and (3) specifically allow a section 501(c)(3) organization to express opinions on controversial issues or advocate particularly positions or viewpoints without jeopardizing its section 501(c)(3) exemption. However, we do recognize that the point at which allowable editorializing becomes attempting to influence legislation is not always easily determined under the present law, and we are sympathetic to the problem encountered in a situation such as that faced by your organization.

You are undoubtedly also aware that this problem has been the subject of recent legislative proposals. A few bills were introduced in the last Congress which would have provided specific guidelines as to the extent a section 501(c)(3) organization can engage in lobbying activity without jeopardizing its exemption. We are informed by the staff of the Joint Committee on Internal Revenue Taxation that this subject is scheduled for further consideration next ses-

sion by the Ways and Means Committee in their Phase II of tax reform.

In view of the Congressional activity on this matter, we believe it would be inappropriate to initiate such a regulation project at this time. However, we are presently reviewing the section 501(c)(3) regulations with a view toward reducing the uncertainty in the lobbying area, as well as addressing other problems under section 501(c)(3).

Sincerely,

/s/ _____

Commissioner

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 79-1464

September Term, 1981

TAXATION WITH REPRESENTATION OF WASHINGTON, APPELLANT

v.

DONALD T. REGAN, SECRETARY OF THE TREASURY, ET AL.

APPEAL from the United States District Court for the District of Columbia.

Before: ROBINSON, *Chief Judge*, and WRIGHT, TAMM, MACKINNON, ROBB, WILKEY, WALD, MIKVA, EDWARDS, AND GINSBURG, *Circuit Judges*

JUDGMENT

This cause came on to be heard on the record on appeal from the United States District Court for the District of Columbia, and was argued by counsel.

On consideration thereof it is ordered and adjudged by this Court that the judgment of the District Court appealed from in this cause is hereby reversed, and the case is remanded to the District Court for further proceedings consistent with the opinion of this Court filed herein this date.

Per Curiam For the Court

/s/_____

GEORGE A. FISHER
Clerk

Date: March 26, 1982

Opinion for the Court filed by Circuit Judge Mikva.

Dissenting opinion filed by Circuit Judge MacKinnon, in which Circuit Judges Robb and Wilkey concur.

Supreme Court of the United States

No. 81-2338

DONALD T. REGAN, SECRETARY OF THE TREASURY, ET AL., APPELLANTS

v.

TAXATION WITH REPRESENTATION OF WASHINGTON

APPEAL from the United States Court of Appeals for the District of Columbia Circuit.

The statement of jurisdiction in this case having been submitted and considered by the Court, in this case probable jurisdiction is noted.

October 4, 1982

Office - Supreme
FILED
JUL [illegible] 1982
[illegible] L. STEVAS,
[illegible] CLERK

No. 81-2338

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

DONALD T. REGAN, SECRETARY OF THE TREASURY, *et al.*,

Appellants,

v.

TAXATION WITH REPRESENTATION OF WASHINGTON,

Appellee.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM OF APPELLEE TAXATION WITH REPRESENTATION OF WASHINGTON

John Cary Sims
(*Counsel of Record*)

Alan B. Morrison
Suite 700
2000 P Street, N.W.
Washington, D.C. 20036
(202) 785-3704

Thomas F. Field
6830 North Fairfax Drive
Arlington, Virginia 22213
(703) 532-1850

Attorneys for Appellee
Taxation with Representation
of Washington

July 23, 1982

THE CADILLAC PRESS, INC. – 1717 K Street N.W. – Washington, D.C. – 833-1200

TABLE OF AUTHORITIES

Cases **Page**

Bob Jones University v. Simon,
416 U.S. 725 (1974) 2

Buckley v. Valeo,
424 U.S. 1 (1976) 5

Cammarano v. United States,
358 U.S. 498 (1959) 5-6

Carey v. Brown,
447 U.S. 455 (1980) 5, 6-7

Citizens Against Rent Control/Coalition for Fair Housing v. City of Berkeley, 102 S.Ct. 434 (1981) 5

First National Bank of Boston v. Belloti,
435 U.S. 765 (1978) 5, 7

Policy Department v. Mosley,
408 U.S. 92 (1972) 5, 7

United States v. O'Brien,
391 U.S. 367 (1968) 5

Village of Schaumburg v. Citizens for a Better Environment, 444 U.S. 620 (1980) 6

Zobel v. Williams,
___ U.S. ___ (June 14, 1982) 7

Statutes:

Internal Revenue Code (Title 26, United States Code):

Section 162(e) 6
Section 170(c) 2
Section 501(c) ..... *passim*

Section 501(c)(4) 3
Section 501(c)(8) 3
Section 501(c)(10) 3
Section 501(c)(19) 3
Section 2055 ..... 2, 3
Section 2106 2
Section 2522 ..... 2, 3
Section 7428 2

Rules of Court

Supreme Court Rule 16.1(c) 4

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

No. 81-2338

DONALD T. REGAN, SECRETARY OF THE TREASURY, *et al.*,

Appellants,

v.

TAXATION WITH REPRESENTATION OF WASHINGTON,

Appellee.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM OF APPELLEE TAXATION WITH REPRESENTATION OF WASHINGTON

This memorandum is submitted by appellee Taxation with Representation of Washington* ("Taxation") to state its position regarding the jurisdictional statement filed by appellants Donald T. Regan, Secretary of the Treasury, Roscoe L. Egger, Jr., Commissioner of Internal Revenue, and the United States of America (hereinafter referred to as the "government"). In addition to filing this response to the government's appeal, Taxation is docketing a cross-appeal stating two additional questions which are closely related to the question raised by the government.

*Appellee Taxation with Representation of Washington has no parent companies, subsidiaries, or affiliates within the meaning of Rule 28.1.

1. Taxation is a nonprofit organization which was formed for the purpose of representing the general public when tax issues are being considered by Congress, the Executive Branch, and the courts (2a).[1] However, Taxation was denied a tax exemption under section 501(c)(3) of the Internal Revenue Code (the "Code") because it does not meet the statutory requirement that "no substantial part" of its activities consist of "attempting to influence legislation" (3a). The organization then filed a declaratory judgment action under 26 U.S.C. § 7428, contending that the statutory restriction on its lobbying violated the First Amendment and the equal protection guarantee of the Fifth Amendment. This challenge to the constitutionality of section 501(c)(3) was eventually heard by the United States Court of Appeals for the District of Columbia Circuit sitting *en banc,* and the decision rendered by that court is reported at 676 F.2d 715 (11a-121a).

The court of appeals held, by a vote of 7-3, that section 501(c) is unconstitutional because it denies Taxation and other charities the equal protection of the laws. The principal disparity in treatment with respect to lobbying which was analyzed by the court of appeals concerns an organization's right to receive contributions which are tax-deductible to the donor. A section 501(c)(3) organization may receive such gifts, which are often a prerequisite to successful fund raising, only if it does not engage in substantial lobbying. Code §§ 170(c)(2) (income tax); 2055(a)(2), 2106(a) (estate tax); 2522(a) (gift tax). *See Bob Jones University v. Simon,* 416 U.S. 725, 729-30 (1974). On the other hand, veterans' organizations may receive tax-deductible contributions no matter how much lobbying they conduct, or on what subjects (23a). *See* Code

[1]Citations in the form "____a" refer to the appendix to the government's jurisdictional statement.

§§ 501(c)(19); 170(c)(3); 2055; 2522.[2] The court of appeals summarized the effect of the statutory provisions as follows:

> For the purposes of this case, the crucial distinction promoted by Section 501 is between organizations that may not receive tax-deductible contributions if they lobby substantially, and organizations that may receive such contributions even if they do.
>
> * * *
>
> An organization such as Taxation may not receive tax-deductible contributions if it engages in "substantial" lobbying, but a qualifying veterans' organization may continue to receive tax-deductible contributions even if it lobbies as much and on as many issues as it chooses.

(17a, 23a). The court found that this discrimination is unconstitutional:

> [T]he Code's discriminatory treatment of lobbying by veterans' organizations does not even satisfy the test of rationality, much less the heightened level of scrutiny appropriate here. The legislative history of the tax exemptions accorded veterans demonstrates absolutely no governmental interest whatsoever that is served

[2] Some veterans' groups are tax-exempt under section 501(c)(4) rather than section 501(c)(19), but under the terms of section 170(c)(3) they still qualify to receive tax-deductible contributions. An organization exempt under section 501(c)(4) which is not an "organization of war veterans" cannot receive tax-deductible contributions. Fraternal societies are accorded tax treatment which is only slightly less favorable than that of veterans' groups. Code §§ 501(c)(8); 501(c)(10); 170(c)(4); 2522.

> by allowing such groups to conduct substantial lobbying with tax-deductible contributions.

(66a).

2. Taxation agrees with the government that the court of appeals' equal protection holding raises a substantial and important question which merits plenary review by this Court. Taxation believes that the decision below is correct, but it does not contend "that it is manifest that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument." S. Ct. Rule 16.1(c). Moreover, as indicated in the jurisdictional statement on cross-appeal filed by Taxation, there are two additional questions which are both closely related to the equal protection issue and substantial enough to merit consideration in conjunction with this appeal. Taxation's cross-appeal requests that this Court (1) consider what the proper remedy should be if the court of appeals' equal protection holding is affirmed, and (2) consider Taxation's alternative First Amendment theory, which was not adopted by the court of appeals. The reasons supporting this Court's consideration of these additional questions are given in Taxation's separate jurisdictional statement on cross-appeal, and will not be repeated here.

3. Although the government correctly describes the constitutionality of sections 501(c) and 170(c) as raising "an important question that should be decided by this Court" (Jurisdictional Statement at 22), its attack on the correctness of the holding of the court of appeals is out of step with the doctrines this Court has developed in equal protection cases which implicate First Amendment rights. Perhaps the most glaring deficiency in the government's jurisdictional statement is its insistence that the challenged classification should be measured against the "rational

basis" standard of review. Jurisdictional Statement at 12. Significantly, the government does not even assert that the classification could be sustained under the heightened standard of review applied by the court of appeals.

The court of appeals was plainly correct in finding that a heightened standard of review should be applied because the lobbying restriction implicates the exercise of First Amendment rights. In directing its inquiry to the questions of "whether the discriminatory framework of Section 501(c) serves a substantial governmental interest and whether the statute is narrowly tailored to serve that end" (45a), the court of appeals followed the standard which this Court has repeatedly applied when fundamental rights protected by the First Amendment are being regulated. *See, e.g., Citizens Against Rent Control/Coalition for Fair Housing v. City of Berkeley,* 102 S. Ct. 434, 436 (1981); *First National Bank of Boston v. Bellotti,* 435 U.S. 765, 786 (1978); *Buckley v. Valeo,* 424 U.S. 1, 25, 64-65, 93-96 (1976); *United States v. O'Brien,* 391 U.S. 367, 377 (1968). Because lobbying is undoubtedly protected by the First Amendment guarantees of free speech, association, and petition, the statutory classification is one which impinges on the exercise of a fundamental right (29a, 89a). Accordingly, a very demanding standard of review is appropriate. *Carey v. Brown,* 447 U.S. 455 (1980); *Police Department v. Mosley,* 408 U.S. 92 (1972).

4. The court of appeals held that the classification challenged by Taxation "does not even satisfy the test of rationality, much less the heightened level of scrutiny appropriate here" (66a). In arguing that the statute measures up to the rationality standard, which it asserts is the appropriate one, the government relies primarily on *Cammarano v. United States,* 358 U.S. 498 (1959), and the policy of "neutrality" toward lobbying which that decision

is said to approve. *See id.* at 513. However, *Cammarano* approves only the nondiscriminatory denial of tax support for lobbying, on the theory that "everyone in the community should stand on the same footing" with respect to lobbying. *Id.* As detailed by the court of appeals, Congress substantially altered its policy toward lobbying in 1962 when it added section 162(e) to the Internal Revenue Code, thereby authorizing deductions for most business-related lobbying (46a-48a, 63a-64a).

The government makes several references to another policy which it says supports the lobbying restriction — that of "preventing abuses of charitable lobbying by private interests". Jurisdictional Statement at 16; *see id.* at 10-11. The court of appeals correctly found that this asserted interest could not in any way justify the preferred treatment granted veterans' groups, since there "is no evidence whatsoever that the lobbying of veterans is less subject to abuse by private interests than that of other Section 501(c) groups" (64a-65a).

5. The government argues that Congress may attack a problem one step at a time. Jurisdictional Statement at 16-18. That may be true in many contexts, but when First Amendment interests are at stake, it must be shown that even the initial steps are "narrowly drawn regulations designed to serve [governmental] interests without unnecessarily interfering with First Amendment freedoms." *Village of Schaumburg v. Citizens for a Better Environment,* 444 U.S. 620, 637 (1980). *Carey v. Brown, supra,* provides another illustration of the application of this principle. There, this Court recognized that the "State's interest in protecting the well-being, tranquility, and privacy of the home is certainly of the highest order in a free and civilized society." 447 U.S. at 471. However, the Court recognized that "even the most legitimate goal may not be

advanced in a constitutionally impermissible manner," and it invalidated the statute in question because it discriminated among pickets based on the subject matter of their expression. *Id.* at 464-65, 471.

6. The government also attempts to support the challenged classification by pointing out that veterans' organizations "are composed principally of war veterans to whom the nation owes special gratitude for enduring the peril and disruption of civil pursuits associated with wartime service in the Armed Forces." Jurisdictional Statement at 19. While this consideration may justify the provision of many types of benefits to veterans, it does not authorize the use of First Amendment rights as a type of currency to reward those who have rendered service. "The First Amendment proscribes governmental efforts to favor one speaker over another" (67a). *See, e.g., Carey v. Brown, supra,* 447 U.S. at 462-63; *First National Bank of Boston v. Bellotti, supra,* 435 U.S. at 784-85; *Police Department v. Mosley, supra,* 408 U.S. at 96. *See also Zobel v. Williams,* ____ U.S. ____ (June 14, 1982).

Finally, the government asserts that "Congress has not in fact given veterans' organizations carte blanche authority to lobby with tax-deductible contributions." Jurisdictional Statement at 21. In support of this proposition, reference is made to certain statutes which prohibit veterans' groups from engaging in partisan political activity. *Id.* at 21-22; *see* 116a-117a. However, those statutes have no relevance whatever to this case, since they regulate only partisan political activity, not lobbying. In fact, section 501(c)(3) organizations are also explicitly prohibited from engaging in any political activity, and that restriction has not been challenged in this action. *See* Code § 501(c)(3) (a charity may not "participate in, or intervene in (including the publishing or distributing of statements),

any political campaign on behalf of any candidate for public office"). Thus, the only significant difference between veterans' groups and other charities is that only the former are unrestricted in their ability to lobby.

CONCLUSION

This case raises a substantial question which should be briefed by the parties and argued before this Court.

Respectfully submitted,

John Cary Sims
(*Counsel of Record*)

Alan B. Morrison
Suite 700
2000 P Street, N.W.
Washington, D.C. 20036
(202) 785-3704

Thomas F. Field
6830 North Fairfax Drive
Arlington, Virginia 22213
(703) 532-1850

Attorneys for Appellee
Taxation with Representation
of Washington

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On Appeal From The United States Court Of Appeals For The District Of Columbia Circuit

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MOTION OF THE AMERICAN LEGION TO INTERVENE AND FOR EXPEDITIOUS CONSIDERATION THEREOF

MITCHELL ROGOVIN
*GEORGE T. FRAMPTON, JR.
VICKI C. JACKSON

ROGOVIN, HUGE & LENZNER
A Professional Corporation
1730 Rhode Island Avenue, N.W.
Suite 1100
Washington, D.C. 20036

*Counsel of Record

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

TABLE OF CONTENTS

	Page
MOTION TO INTERVENE AND FOR EXPEDITIOUS CONSIDERATION THEREOF	1
STATEMENT OF THE CASE	1
INTERESTS OF THE AMERICAN LEGION	5
ARGUMENT	6
A. The Legion's Interests And Those of Its Members And Benefactors Are Plainly Affected By This Decision And Affirmance of the Court of Appeals' Decision May Substantially Impair Its Ability to Protect Those Interests	7
B. The American Legion's Interests Are Not Adequately Represented By Existing Parties	8
C. This Motion To Intervene Is Timely	12
REQUEST FOR EXPEDITED CONSIDERATION	14
CONCLUSION	15

INDEX TO APPENDICES

Appendix A	Opinion of the Court of Appeals for the District of Columbia Circuit (*en banc*) of March 26, 1982	1a
Appendix B	Motion of The American Legion to Intervene and for Expeditious Determination of this Motion in the Court of Appeals, filed April 30, 1982	98a
Appendix C	Government's Memorandum in Opposition to Motions for Intervention in the Court of Appeals, filed May 14, 1982	121a
Appendix D	Reply Memorandum of The American Legion in Support of Its Motion to Intervene in the Court of Appeals, filed May 18, 1982	126a
Appendix E	Order of the Court of Appeals for the District of Columbia of May 27, 1982, Denying Intervention	129a

TABLE OF AUTHORITIES

Cases	Page
Banks v. Chicago Grain Trimmers Association, 389 U.S. 813, 390 U.S. 459 (1968)	6
Dames & Moore v. Regan, 453 U.S. 654 (1981)	5
Eastern-Central Motor Carriers Association v. United States, 321 U.S. 194 (1944)	5, 6
Foster v. Gueory, 655 F.2d 1319 (D.C. Cir. 1981)	8, 11
Hodgson v. United Mine Workers of America, 473 F.2d 118 (D.C. Cir. 1972)	11, 13
Hunter v. Ohio ex rel. Miller, 396 U.S. 879 (1969)	6
International Union v. Scofield, 382 U.S. 205 (1965)	6
National Farm Lines v. ICC, 564 F.2d 381 (10th Cir. 1977)	11
NLRB v. Acme Industrial Co., 384 U.S. 925, 385 U.S. 432 (1966)	5
Rogers v. Paul, 382 U.S. 198 (1965)	6
Trbovich v. United Mine Workers of America, 404 U.S. 528 (1972)	10
United Airlines v. McDonald, 432 U.S. 385 (1977)	12
United States v. Terminal Railroad Association, 236 U.S. 194 (1915)	5, 6
Wolpe v. Poretsky, 144 F.2d 505 (D.C. Cir.), *cert. denied*, 323 U.S. 777 (1944)	12
Statutes	
26 U.S.C. § 170	6
26 U.S.C. § 501(c)(3)	*passim*
26 U.S.C. § 501(c)(4)	9
26 U.S.C. § 501(c)(19)	6, 9
26 U.S.C. § 501(h)	11, 12
26 U.S.C. § 2055	6
26 U.S.C. § 2522	6
26 U.S.C. § 7428	1, 2, 3
28 U.S.C. § 1252	13
28 U.S.C. § 2101(a)	13
28 U.S.C. § 2101(c)	13
36 U.S.C. §§ 41-49	5

TABLE OF AUTHORITIES—Continued

Miscellaneous Page

Supreme Court Rule 10 4
Supreme Court Rule 12 13
Supreme Court Rule 28.1 5
Supreme Court Rule 42.2(b) 14
Fed. Rule Civ. Proc. 24 ..... 6, 8, 11

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On Appeal From The United States Court Of Appeals For The District Of Columbia Circuit

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MOTION OF THE AMERICAN LEGION TO INTERVENE AND FOR EXPEDITIOUS CONSIDERATION THEREOF

The American Legion hereby moves this Court to permit it to intervene in this matter as a party-appellee for the purpose of briefing the issues raised by the Jurisdictional Statement expected to be filed by the Government on June 22, 1982, and, if probable jurisdiction is noted, for the purpose of submitting briefs on the merits.

STATEMENT OF THE CASE

On March 26, 1982, the United States Court of Appeals for the District of Columbia rendered an *en banc* decision in the above-captioned matter, reversing the prior decision of a three-judge panel which had upheld the District Court's grant of summary judgment to the Government in this taxpayer suit brought pursuant to § 7428 of the Internal Revenue Code of 1954 (as amended),

26 U.S.C. § 7428. The Court of Appeals directed that the case be remanded to the District Court for the framing of relief for what the Court perceived to be an unconstitutional discrimination in the federal tax statutes between veterans organizations, on the one hand, and nonprofit organizations entitled to tax-exempt status under § 501(c)(3) of the Internal Revenue Code of 1954 (as amended), 26 U.S.C. § 501(c)(3). The Court of Appeals also directed that prior to further proceedings, the District Court invite affected veterans groups to participate in the case as parties. On April 23, 1982, the United States timely filed a Notice of Appeal, and is expected to file a jurisdictional statement on or before June 22, 1982.

Upon learning of the Government's decision to seek immediate review of the Court of Appeals decision in this Court, the American Legion, on April 30, 1982, filed a Motion for Leave to Intervene And For Expeditious Determination Thereof in the Court of Appeals. Two other veterans organizations, the Paralyzed Veterans of America (PVA) and the Disabled American Veterans (DAV) had filed a Motion to Intervene on April 23, 1982 and the Veterans of Foreign Wars subsequently filed a Motion to Intervene on May 3, 1982. The United States filed a consolidated opposition to these intervention motions, arguing essentially that it would adequately represent the veterans organizations' interests. On May 27, 1982, in an unsigned per curiam order, all of these motions to intervene were denied by the Court of Appeals.

The Court of Appeals decision in this case stands to affect substantially and adversely the current tax status of all veterans organizations, of which the American Legion is the largest in the country. The Court held that the equal protection requirements of the Fifth Amendment were violated by the fact that veterans organizations may receive tax deductible contributions but have no statutory restrictions on their lobbying activities,

while other non-profit groups which receive tax deductible contributions, specifically those recognized as public charities under § 501(c)(3) of the Internal Revenue Code, are subject to limitations on their lobbying activities. Although this action was brought under § 7428 of the Internal Revenue Code simply as a challenge by plaintiff, Taxation With Representation of Washington (TWRW), to the denial by the Internal Revenue Service of its application for § 501(c)(3) status, and sought only a declaratory judgment that TWRW was entitled to that status, the majority opinion of the *en banc* Court of Appeals strongly indicated that on remand the District Court should cure the unconstitutional discrimination it found by ordering lobbying restrictions to be imposed on veterans organizations such as the American Legion. Indeed the Court of Appeals, recognizing that neither the American Legion—to which its opinion frequently referred—or any other veterans organization had participated in the case in any way up to that time, specifically directed the District Court on remand to invite the participation of such groups.

The American Legion first became aware of the pendency of this case after the issuance of the Court of Appeals' *en banc* decision, and decided to participate in the remand proceedings in the District Court in order to protect its interests. Affidavit of Bertram G. Davis, ¶¶ 9, 11 App. 109a-110a. With the filing of the Government's Notice of Appeal, however, it became apparent that this Court would consider the entire matter first. Should this Court sustain the Court of Appeals' finding of unconstitutionality, that decision alone could adversely and substantially affect the Legion's rights. Further, should this Court seek to fashion its own remedy rather than remanding the case for further proceedings, the rights which the Legion seeks to protect could be finally determined without its participation. Thus the Legion's intervention as a party in this Court is both necessary and appropriate.

TWRW, Appellee herein, has authorized counsel to represent to this Court that it has no objection to this Motion. While the Government has indicated that it would not oppose the Legion's participation as amicus curiae, the Legion submits that in the unusual posture of this case both fundamental fairness to the Legion and its 2,400,000 members, and the best interests of justice in obtaining full adversarial briefing of all relevant issues, support the Legion's request to participate as an intervenor.[1]

The Legion did not file or tender a timely Notice of Appeal in the court below, in part because of its understanding that the case would be remanded to the District Court. See Davis Aff. ¶ 9, App. 109a-110a. While a petition for certiorari to review the decision below could be timely filed at any time up through June 24, 1982, the Legion does not seek to intervene for purposes of filing such a petition since, by virtue of the Government's appeal, the entire case is brought before the Court for review and thus such a petition is unnecessary.[2]

There is ample authority and precedent to support a decision permitting intervention directly in this Court for the purpose of filing briefs on the important issues

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[1] There are significant advantages to participation as a party intervenor, rather than as amicus curiae, including more ample page limitations for presentation of argument and the right to file a reply brief. Because of the unusual posture of this case, some of the arguments the Legion intends to advance and some of the factual material proffered will of necessity be raised for the first time in this Court, as further discussed below in this Motion. Therefore the right of reply to Appellee's rebuttal of this material assumes particular importance here.

[2] Under Supreme Court Rule 10, any party other than an appellant is considered an appellee, and may respond to appellant's jurisdictional statement within twenty days of its receipt of that statement, even though it may be supporting appellant's position. With regard to briefing on the merits, an appellee supporting appellant's position must, however, file its brief within the same time period permitted appellant.

presented.[3] As set forth in more detail below, the criteria for permitting such intervention by the American Legion are met here because the Legion's interests are very substantially affected; its interests will not be adequately represented by any of the existing parties (indeed, on the question of remedies the Government's position may well be contrary to that of veterans groups); the Legion intends to raise issues that have not previously been raised or focused upon by the parties, and may not be raised by any other party in this Court; and the Legion's attempts to intervene are timely.

INTERESTS OF THE AMERICAN LEGION

The American Legion is the single largest organization of veterans in the United States. Its membership is restricted to those who have served in the naval or military services during World War I, World War II, the Korean or Vietnam conflicts, provided that they were honorably discharged or separated, or continued to serve honorably. 36 U.S.C. § 45. In addition to its 2,400,000 members, the Legion is made up of 15,800 posts located in states across the country and in seven foreign countries.[4] The Legion was chartered by special Act of

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[3] In *United States v. Terminal Railroad Association*, 236 U.S. 194, 199 (1915), the Court permitted certain parties denied intervention below to intervene in pending appeals for reasons very similar to those advanced here: to wit, to obtain modification of a decree claimed to prejudice their rights. Moreover, in *Eastern-Central Motor Carriers Association v. United States*, 321 U.S. 194, 198-99, n.5 (1944), the Court granted a motion to intervene for the purposes of filing briefs on a matter then pending. Accord, *NLRB v. Acme Industrial Co.*, 384 U.S. 925, 385 U.S. 432 (1966) (union permitted to intervene as party before the Court and file brief in support of its interests); *Dames & Moore v. Regan*, 453 U.S. 654 (1981).

[4] In compliance with Supreme Court Rule 28.1, the Legion states that its 15,800 affiliated posts and 58 Departments (seven of which are in foreign countries) all bear the words "American Legion" in their titles. The American Legion also recognizes as an auxiliary

Congress in 1919. Its criteria for membership were set forth in that statute and have been amended from time to time by the Congress. *See generally* 36 U.S.C. §§ 41-49.

The Legion and its subsidiaries are exempt from federal income taxation under § 501(c)(19) of the Internal Revenue Code of 1954 (as amended), 26 U.S.C. § 501(c)(19), and contributions to the Legion are deductible for income tax purposes under § 170 and for gift and estate tax purposes under §§ 2522 and 2055 of the Code. 26 U.S.C. §§ 170, 2055, 2522. The Legion has a legislative office in Washington, D.C. and a legislative program relating to specified issues of direct interest and benefit to its members. And the Legion receives a small portion of its income from deductible bequests or contributions. Its interests in this case are thus apparent.

ARGUMENT

It has long been clear that motions to intervene may be permitted after the entry of a final judgment. *International Union, Local 283 v. Scofield*, 382 U.S. 205 (1965); *Eastern-Central Motor Carriers Association of the United States*, 321 U.S. 194 (1944); *United States v. Terminal Railroad Association*, 236 U.S. 194, 199 (1915).[5] In *Scofield* this Court suggested that, in ruling on such motions, the standards and policies expressed in Rule 24 of the Federal Rules of Civil Procedure should serve as a guide. 382 U.S. at 217 n.10. Rule 24 requires that an application for intervention must show (i) that the applicant has an interest in the subject matter of the action,

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organization "The American Legion Auxiliary," an Indiana corporation. The Legion has no parents, subsidiaries or affiliates other than as set forth above.

[5] This Court has on numerous occasions permitted direct intervention in cases before the Court. *Banks v. Chicago Grain Trimmers Ass'n*, 389 U.S. 813, 390 U.S. 459 (1968); *Hunter v. Ohio ex rel. Miller*, 396 U.S. 879 (1969); *Rogers v. Paul*, 382 U.S. 198 (1965).

(ii) that the interest is not adequately represented by an existing party, and (iii) that the motion is timely filed. In view of the unusual posture of this case, the Legion submits that each of these criteria is met and that its right to intervene is clear.[6]

A. The Legion's Interest And Those Of Its Members And Benefactors Are Plainly Affected By This Decision, And Affirmance Of The Court of Appeals Decision May Substantially Impair Its Ability To Protect Those Interests.

In its *en banc* decision, the Court of Appeals itself recognized that its ruling vitally affected the interests of veterans groups. *See generally* App. 57a-58a. Thus the Court of Appeals, after concluding that there was a constitutionally objectionable "differential" in tax treatment, concluded that "the most obvious remedy—striking down the Section 501(c)(3) lobbying limitation that now governs Taxation [plaintiff]—poses the most obvious problems," in view of Congress' intent to regulate the amount of tax deductible dollars going to § 501(c)(3) organizations for lobbying. App. 54a. Stating that the Supreme Court had "recognized" that "unconstitutional unequal treatment" could be cured by taking benefits "away from a preferred group," it remanded the case to the District Court with a strong suggestion that "the preferential treatment now accorded the lobbying of veterans' organizations" be eliminated. App. 57a.

If this Court were to affirm the Court of Appeals' conclusion that any disparity in treatment between veterans groups and other non-profit organizations is in fact unconstitutional, or its further conclusion that the "most

[6] The only organizations to have sought intervention in the Court of Appeals, in addition to The American Legion, are the DAV, PVA and the Veterans of Foreign Wars (VFW), all of which have either filed or indicated their intention to file intervention motions in this Court. To the best of our knowledge and belief, no other organizations intend to seek intervention in this Court.

logical" remedy would be to impose restrictions on lobbying activity by veterans groups which Congress did not enact, then in either event it is plain that the Legion's efforts to preserve its current tax status and freedom from restraint as to legislative activity heretofore carried on without governmental regulation would be substantially and seriously impaired. *See, Foster v. Gueory*, 655 F.2d 1319, 1322-24 (D.C. Cir. 1981). The Court of Appeals decision, in short, so vitally and directly affects the interests of the Legion and its members that the Legion's participation as an intervenor here is appropriate.

B. The American Legion's Interests Are Not Adequately Represented By Existing Parties

The second criterion of Rule 24, that intervenors' interests not be "adequately represented by existing parties," is also met here for at least four separate reasons.

First, while the Government undoubtedly will defend the constitutionality of the statutory scheme,[7] resolution of that issue may depend in large part upon development of historical and legislative background information evidencing those particular government interests that support the treatment presently accorded veterans organizations. The American Legion, as the largest veterans organization in the United States, is in a far better position than the Government to articulate these interests fully and completely.

In this connection, it is significant that neither party to the proceeding below appears to have advanced any evidence as to the nature of the lobbying activities or source of funding for the American Legion (or any other individual veterans organization). As a result, for example, the Court of Appeals assumed, on the basis of a

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[7] TWRW obviously cannot adequately represent the interests of the Legion since it is by virtue of TWRW's attack upon the constitutionality of the statute that the Legion's interests have been placed in jeopardy.

law review article published in 1973, that the Legion and its affiliates are "among the most active lobbying organizations" in Congress, App. 12a; in fact, of the Legion's 1982 budget approximating $23 million, only $314,284 is allocable to the legislative division, and of this, the major portion is allocated to employee salaries and benefits. The Court of Appeals' erroneous belief that the Legion devoted a substantial portion of its resources to lobbying may well have colored its conclusion both as to the existence of an unconstitutional discrimination and as to the propriety of a remedy.[8] Yet neither the Government nor the plaintiff in this case sought to assure the accurate presentation of facts upon which this issue could be decided.[9]

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[8] The majority opinion of the Court of Appeals contains other inaccuracies concerning the activities of the American Legion and of other veterans organizations as well. For example, the majority seemed to regard the Legion's congressional appearances in hearings on postal service to be outside the scope of its exempt purposes. *See* App. 12a & n.11. But because of the Legion's publication of a monthly magazine for its members, it has a direct and important interest in postal costs and service affecting mailings by non-profit organizations. *See*, e.g., Statement of the American Legion, by James F. O'Neil and Mylo S. Kraja Before the Subcommittee for Treasury, Postal Service and General Government, House Committee on Appropriations (April 5, 1977).

[9] The intervention motion filed by the DAV and PVA is, at this writing, still pending before this Court and those organizations are thus not technically "parties" for purposes of determining the adequacy of the representation provided by existing parties. Even if those motions should be granted, however, the American Legion, as the largest veterans organization in America, should also be permitted to intervene.

The legal position of the Legion, moreover, is quite distinct from that of the DAV and PVA. DAV and PVA are both § 501(c)(4) organizations and, according to affidavits filed by their officers in the Court of Appeals, depend heavily on deductible public contributions for their source of support. The Legion, by contrast, is a § 501(c)(19) organization; receives only a small proportion of its income from deductible contributions from the

Second, the American Legion and the Government may well take opposing positions on questions relating to remedy should the statute be found unconstitutional. In the Court of Appeals, the Government opposed the Legion's Motion To Intervene in large part on the ground that it would adequately represent the Legion's interests. Yet the Government itself suggested in a brief in the District Court that if an unconstitutional discrimination were found it might be remedied by imposing additional restrictions on "other" organizations, including veterans. Brief for the United States In Support Of Cross-Motion For Summary Judgment, at 43, n.55. See also Supplemental Brief for the United States on Rehearing in the Court of Appeals, at 34. This position was ultimately adopted by that Court's *en banc* majority. It is somewhat anomalous that the Government, having suggested the very restriction that has triggered this Motion To Intervene by the Legion, now argues that it will adequately protect the Legion's interest before this Court.

In short, it is readily apparent that the Government's interests do "not dictate precisely the same approach to the conduct of the litigation" as do the American Legion's. *Trbovich v. United Mine Workers of America*, 404 U.S. 528, 539 (1972). The substantial possibility that the Government and the American Legion may take contrary positions on remedy is, we submit, by itself more than sufficient to satisfy what has been described as the "minimal burden" of showing possible inadequacy

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public; and addresses a wider range of issues in its legislative activities than do either DAV or PVA.

In addition to its relatively small amount of lobbying activities, the Legion is also involved in a wide range of public service activities consistent with its charter such as Boys State and Boys Nation, sponsorship of scout troops and the National Oratorical Contest which rewards outstanding high school students with substantial scholarships, the provision of assistance in VA Board of Veterans Appeals cases and Defense Department Discharge Review Board cases, and on site inspection of VA's 172 hospitals. It also publishes a monthly magazine with an estimated readership of seven million.

of representation by public official defendants for purposes of the policy concerns expressed in Rule 24(a)(2). *See, Foster v. Gueory, supra,* 655 F.2d at 1325; *National Farm Lines v. ICC,* 564 F.2d 381, 383-84 (10th Cir. 1977); *Hodgson v. United Mine Workers of America,* 473 F.2d 118, 130 (D.C. Cir. 1972).

Third, and also pertinent to the question of remedy, the American Legion presently intends to argue at least one issue that may not be raised by any other party. In addition to arguing that any remedy placing new restrictions on veterans organizations would not be an appropriate step, the Legion will argue that the courts indeed do not possess the power to effect such a remedy judicially in the context of this case. We will argue that this result flows not only from traditional equitable limitations on the exercise of judicial power but also from the limited scope of the jurisdictional statute here at issue, and from the separation of powers doctrine arising from the Constitution itself. That a court may, if it concludes that an act of Congress is unconstitutional, strike down or refuse to enforce the offending provision is well-established. The Court of Appeals' proposition—that in order to cure an unconstitutional provision a district court may, in effect, legislate where Congress chose not to—is, the Legion submits, both novel and in this case wrong.

Fourth, it is plain from a reading of the opinion below that the parties failed to raise or fully brief arguments of obvious relevance. In addition to the defense of res judicata,[10] the Government apparently failed to fully brief the relevance of the § 501(h) election to engage in lobby-

[10] Both the majority and dissenting opinions noted the Government's failure to raise this seemingly available defense. The majority stated that, "[d]espite the close relationship between issues and parties [in a prior decision adverse to the taxpayer]," the Government had not pled res judicata and the court would not consider it *sua sponte.* App. 3a-4a, n.1. The dissent also engaged in an extensive discussion of the res judicata issue. App. 65a-66a, n.9.

ing activities, which is now permitted to § 501(c)(3) organizations. Pursuant to § 501(h), § 501(c)(3) organizations can expend as much as 20% of their budget on lobbying activities without suffering either a tax or possible loss of their exempt status, and may exceed that amount on an occasional basis without jeopardizing their exempt status as well. In evaluating the significance of any perceived differential in tax treatment of § 501(c)(3) organizations and other § 501 organizations in connection with restrictions on lobbying activities, this provision—enacted as part of the Tax Reform Act of 1976—would seem to have been of obvious relevance. Neither party, however, "focus[ed] on the significance of this issue," (dissenting opinion at App. 79a, n.25), and apparently as a result, the majority opinion assumed that § 501(c)(3) organizations were simply not permitted to engage in any "substantial" lobbying activities.

These factors not only demonstrate the inadequacy of representation of the Legion's interests provided by other parties, but also highlight what the Legion believes to be the interests of this Court in obtaining complete and full briefing on this case. The decision below is not only novel but has sweeping implications for federal taxing statutes and the development of constitutional law. It should only be decided, we submit, on an appropriate record, and with appropriate representation by all affected parties before the Court.

C. This Motion To Intervene Is Timely

This Court and the lower federal courts have long recognized that in determining the timeliness of a motion to intervene after judgment for the purpose of participating in or initiating an appeal, "[t]he critical inquiry in every such case is whether in view of all the circumstances the intervenor acted promptly after the entry of final judgment." *United Airlines, Inc. v. McDonald*, 432 U.S. 385, 395-96 (1977); *Wolpe v. Poretsky*, 144 F.2d 505, 508 (D.C. Cir.), *cert. denied*, 323 U.S. 777 (1944). As the lower courts have explained Rule 24's

timeliness requirement, "the amount of time which has elapsed . . . is not in itself the determinative test of timeliness. Rather, the courts should also look to the related circumstances, including the purpose for which intervention is sought, the necessity for intervention as a means of preserving the applicant's rights, and the improbability of prejudice to those already parties in the case." *Hodgson v. United Mine Workers, supra*, 473 F.2d at 129. All of these criteria favor granting this intervention motion.

To begin with, both this motion and the Legion's prior motion in the Court of Appeals were filed well within the time permitted the Government to docket its appeal in the Supreme Court and thus well before any brief by the American Legion as a party to this appeal would be due.[11] Grant of this motion would therefore in no way prejudice the speedy and timely disposition of this appeal in this Court.

Moreover, as set forth in the Affidavit of Bertram G. Davis, ¶¶ 9, 11 App. 109a-110a, the American Legion had no knowledge of this case, and thus that its tax status —and specifically, its freedom from lobbying restrictions or the validity of donors' deductibility of contributions to it—might be adversely affected by this litigation until after the announcement of the decision of the *en banc* Court of Appeals on March 26, 1982. The American Legion did not obtain a copy of the Court's decision until several days after it issued, and thereafter concluded that, since the Court of Appeals had directed a remand in which veterans organizations would be invited to participate in framing

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[11] Pursuant to 28 U.S.C. §§ 1252, 2101(a), and Supreme Court Rule 12, the Government's appeal will not be deemed docketed until, within 60 days from the filing of the notice, the Government files its jurisdictional statement. The Legion's motions to intervene were both also filed well within the time period within which a petition for certiorari could be timely filed. *See* 28 U.S.C. § 2101(c).

the remedy, it would participate in the remedial proceedings before the District Court to seek to avoid any adverse effect upon its own status. Davis Aff. ¶ 9, App. 109a. As soon as the American Legion learned that the Government had filed a notice of appeal on Friday, April 23, thereby invoking the Supreme Court's mandatory appellate jurisdiction, the American Legion acted promptly to protect its interests. *Id.* ¶ 10, App. 110a. On Tuesday, April 27, undersigned counsel was retained to represent the Legion in these proceedings, and the Legion's Motion To Intervene in the Court of Appeals was filed three days later. The Court of Appeals denied that motion on May 27, 1982. On June 9, 1982, the Legion formally advised this Court of its intention promptly to file the instant Motion To Intervene in this Court.[12] The motion is being filed with this Court in typewritten fashion on June 11, 1982.[13]

REQUEST FOR EXPEDITED CONSIDERATION

The American Legion respectfully requests expedited consideration of this motion. The ascertainment of the applicable time periods for filing of briefs in this Court (whether as a party-appellee or as an amicus curiae) are dependent upon whether this motion to intervene is granted, and with the Jurisdictional Statement due on June 22, 1982, these deadlines are rapidly approaching.

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[12] The Legion has sought intervention directly in this Court rather than challenging the Court of Appeals' denial of its intervention motion by way of a petition for certiorari, because it is in the best interests of all interested parties to obtain a speedy determination of their status in connection with the briefing of this appeal.

[13] Forty printed copies of the Motion will be filed on Monday, June 14, 1982, as required by Sup. Ct. R. 42.2(b).

CONCLUSION

For all the reasons set forth above, the American Legion respectfully submits that its interests are so vitally implicated by the decision below that its motion to intervene should be granted.

Respectfully submitted,

MITCHELL ROGOVIN
*GEORGE T. FRAMPTON, JR.
VICKI C. JACKSON

ROGOVIN, HUGE & LENZNER
A Professional Corporation
1730 Rhode Island Avenue, N.W.
Suite 1100
Washington, D.C. 20036

*Counsel of Record

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 79-1464

TAXATION WITH REPRESENTATION OF WASHINGTON,
Appellant

v.

DONALD T. REGAN, SECRETARY OF THE TREASURY, ET AL.

Appeal from the United States District Court
for the District of Columbia
(D.C. Civil Action No. 78-0834)

Argued En Banc October 14, 1981

Decided March 26, 1982

John Cary Sims with whom *Alan B. Morrison* and *Thomas F. Field* were on the brief for appellant.

Frank P. Cihlar, Attorney, Department of Justice, with whom *John F. Murray*, Acting Assistant Attorney General, *Charles F. C. Ruff*, United States Attorney at the time the briefs were filed, *Michael L. Paup* and *Richard Farber*, Attorneys, Department of Justice, were on the brief for appellees. *Ernest J. Brown*, *Leonard J. Henzke, Jr.* and *Philip I. Brennan*, Attorneys, Department of Justice, also entered appearances for appellees.

Before ROBINSON, *Chief Judge*, and WRIGHT, TAMM, MACKINNON, ROBB, WILKEY, WALD, MIKVA, EDWARDS, and GINSBURG, *Circuit Judges*.

Opinion for the court filed by *Circuit Judge* MIKVA.

Dissenting opinion filed by *Circuit Judge* MACKINNON, in which *Circuit Judges* ROBB and WILKEY concur.

MIKVA, *Circuit Judge*: Taxation with Representation of Washington (Taxation) challenges the lobbying restrictions on certain nonprofit organizations required by Section 501(c)(3) of the Internal Revenue Code, 26 U.S.C. § 501(c)(3), as a violation of its First Amendment and equal protection rights. The whole of Taxation's argument well exceeds the sum of its parts. Taxation's case is weak if it is viewed solely as a First Amendment claim, because the Constitution does not require Congress to subsidize First Amendment activity. Taxation also has a weak case solely in terms of equal protection; Congress has vast leeway under the Constitution to classify the recipients of its benefits and to favor some groups over others. But a First Amendment concern must inform the equal protection analysis in this case. Courts must scrutinize with special care any act by Congress that facilitates the speech of one speaker over another, even when legislation is enacted in the dry, classification-ridden context of the Internal Revenue Code. By subsidizing the lobbying activities of veterans' organizations while failing to subsidize the lobbying of Taxation and other charitable groups, Congress has violated the equal protection guarantees of the Constitution. The district court erroneously rejected Taxation's constitutional challenge, and we accordingly reverse.

Because this case is complex, it may be useful to set out in advance the path that our reasoning follows. The opinion begins with an explanation of the internal revenue provisions at issue (cited as I.R.C. or by Section) and the discrimination established by those provisions. In the second part of the opinion, we explain why the statute's classifications must be given close judicial scrutiny. The third section then identifies and assesses the substantiality of the governmental interests said to justify the discrimination, and concludes that the statute

is unconstitutional. The final section of the opinion discusses the appropriate remedy for this violation and the need for a remand to the district court.

I. BACKGROUND

Taxation is a nonprofit charitable and educational organization that was formed to represent the general public on tax issues before Congress, the courts, and the executive branch.[1] After its incorporation in June 1977,

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[1] Taxation was created as the result of a merger between two other organizations, Taxation with Representation Fund (TWRF), a group devoted to courtroom advocacy, and Taxation with Representation (TWR), a group devoted to legislative activity. TWR had been incorporated in 1970 as a social welfare organization exempt from federal income taxes under Section 501(c)(4), 26 U.S.C. § 501(c)(4) [hereinafter cited as I.R.C.], but liable for unemployment taxes and ineligible for tax deductible contributions under I.R.C. § 170. In 1974, TWR was denied classification as a Section 501(c)(3) organization, and appealed unsuccessfully in *Taxation with Representation v. United States*, 585 F.2d 1219 (4th Cir. 1978), *cert. denied*, 441 U.S. 905 (1979).

Taxation apparently absorbed the functions of TWR after TWR lost its appeal, *see* Brief for Appellee United States (IRS Brief) at 4, and Taxation makes the same claims here that were rejected by the Fourth Circuit. Despite this close relationship between issues and parties, however, the government has not pleaded or argued that Taxation should be precluded by res judicata from litigating this case, and we decline to reach the question *sua sponte*.

Several litigants in this and other courts have also unsuccessfully raised issues related to those we decide here. *See, e.g., Christian Echoes National Ministry, Inc. v. United States*, 470 F.2d 849 (10th Cir. 1972), *cert. denied*, 414 U.S. 864 (1973) (religious organization challenged loss of exemption as result of substantial legislative activity as violation of free exercise clause); *Haswell v. United States*, 500 F.2d 1133 (Ct. Cl. 1974), *cert. denied*, 419 U.S. 1107 (1975) (taxpayer sued for refund on theory that his contributions to organization that engaged in extensive lobbying should have been deductible as charitable contributions); *Tax Analysts & Advocates v. Shultz*, 376 F. Supp. 889 (D.D.C. 1974), *app. dismissed mem. sub nom. Tax Analysts & Advocates v. Simon*, 512 F.2d 992 (D.C. Cir. 1975) (suit for declaratory judgment that legislative activity restrictions of Section 501(c)(3) were unconstitutional dismissed

Taxation applied to the Internal Revenue Service (IRS) for a declaration that it was an organization described in Section 501(c)(3).[2] Although Taxation otherwise qualified for tax-exempt status under that section, it did not meet the requirement that "no substantial part" of its activities consist of "attempting to influence legislation." The IRS specifically found that Taxation's "stated purposes include attempting to influence legislation, and legislative advocacy may constitute a substantial part of your activities." Notification of Adverse Ruling, February 14, 1978, Joint Appendix (J.A.) 48. As a result, Taxation was ineligible for several tax benefits provided by Section 501(c)(3), particularly the eligibility to receive tax-deductible contributions from donors.[3]

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because action barred by I.R.C. § 7421(a), barring suits to restrain or enjoin collection of taxes). Taxation with Representation was also a party to the latter suit, but its complaint was dismissed without prejudice. *See* 35 A.F.T.R.2d 1352.

[2] Section 501(c)(3) applies to:

> Corporations, and any community chest, fund, or foundation, organized and operated exclusively for religious, *charitable*, scientific, testing for public safety, literary, or *educational* purposes, or to foster national or international amateur sports competition (but only if no part of its activities involve the provision of athletic facilities or equipment), or for the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private shareholder or individual, *no substantial part of the activities of which is carrying on propaganda, or otherwise attempting, to influence legislation* (except as otherwise provided in subsection (h)), and which does not participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of any candidate for public office.

(emphasis added). Such organizations are exempt from taxation under the income tax subtitle unless such exemption is denied under I.R.C. §§ 502, 503, and 504.

[3] *See* I.R.C. § 170(c). Other tax benefits accruing to a § 501(c)(3) organization include exemption from federal social security taxes (FICA), I.R.C. § 3121(a), and exemption from federal unemployment taxes (FUTA), I.R.C. § 3306.

Taxation exhausted its administrative remedies, and then sought in May 1978 to overturn the IRS decision by bringing a declaratory judgment action under I.R.C. § 7428.[4] Upon consideration of cross-motions for summary judgment, the district court ruled for the defendants. Memorandum Opinion, January 31, 1979, J.A. 56-64. Taxation appealed the district court's decision, and a three-judge panel of this court decided on April 14, 1981, to uphold the trial court. On June 11, 1981, a majority of the full court of appeals voted to vacate the panel opinion and rehear the case *en banc*.

A. *The Statutory Scheme*

Before considering the issues presented by this case, it is first necessary to examine the classifications that are under review. Congress has excluded various types of organizations from the taxing provisions of the Code, and I.R.C. § 501 "is the linchpin of the statutory benefit system." *Simon v. Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26, 29 n.1 (1976). This section describes several dozen kinds of organizations that are exempt from federal taxation on the income they receive.

There are other important components of the tax benefits provided by Section 501 in conjunction with other provisions of the Code, however. The chief source of income for many of the nonprofit organizations described in the statute is private contributions. In order to encourage such giving, Congress has frequently provided that contributors to various Section 501(c) organizations may take a deduction based on the amount of the contribution. Because the Code imposes three general taxes on individuals—on income, gifts, and estates—the provisions

[4] I.R.C. § 7428 authorizes certain courts to issue declaratory judgments in appropriate cases relating to the status and classification of organizations under I.R.C. § 501(c)(3). Congress enacted this section of the Code as part of the Tax Reform Act of 1976, Pub. L. No. 94-455, 90 Stat. 1520.

allowing contributions to take these deductions appear in three separate portions of the Code. *See* I.R.C. §§ 170, 2055, 2522. Aside from this complexity, however, the general scheme is simple. Congress has accorded certain organizations a double benefit: exemption from taxes on their own income, and eligibility to receive contributions and gifts that are deductible from the donors' taxes as well. Throughout this opinion, tax exemption refers to the first benefit; and tax-deductibility to the second.

Every organization described in Section 501 enjoys some form of tax exemption, but only some are eligible to receive tax-deductible contributions. The status of any particular organization, of course, can only be ascertained by examining the other portions of the Code that provide deductions to the organization's donors. A further complication lies in the fact that the Code differentiates among those organizations eligible to receive tax-deductible contributions in terms of the uses to which the organization's income may be put. For the purposes of this case, the crucial distinction promoted by Section 501 is between organizations that may not receive tax-deductible contributions if they lobby substantially, and organizations that may receive such contributions even if they do.

Section 501(c)(3) organizations—sometimes simply called "charitable" organizations—are examples of the former. A donor to such an organization may deduct his contributions to it by virtue of the relevant provisions in the Code. See I.R.C. § 170(c)(2) (income tax deductions); I.R.C. §§ 2055(a)(2), 2106(a) (estate tax deductions); I.R.C. § 2522(a) (gift tax deductions).[5] The

[5] I.R.C. § 170(a) states the "general rule" that deductions shall be allowed for "any charitable contribution," defined in subsection (c). Section 170(c) defines "charitable contribution" as a contribution or gift to or for the use of

> (2) A corporation, trust, or community chest, fund, or foundation—

Code limits the amount of lobbying that may be conducted by the Section 501(c)(3) organization, however, whether or not the lobbying is related to its exempt purpose.[6] *See Slee v. Commissioner*, 42 F.2d 184 (2d

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(A) created or organized in the United States or any possession thereof, or under the law of the United States, any State, the District of Columbia, or any possession of the United States;

(B) organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes, or to foster national or international amateur sports competition (but only if no part of its activities involve the provision of athletic facilities or equipment), or for the prevention of cruelty to children or animals;

(C) no part of the net earnings of which inures to the benefit of any private shareholder or individual; and

(D) *which is not disqualified for tax exemption under section 501(c)(3) by reason of attempting to influence legislation*, and which does not participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of any candidate for public office.

(emphasis added). Similar language permits donors to make analogous deductions with respect to gift tax, I.R.C. § 2522(a)(2) (citizens or residents) and (b)(2) (nonresident aliens), and estate tax, I.R.C. §§ 2055(a)(3) (citizens or residents) and 2106(a)(2)(A)(ii) (nonresident aliens). Gift and estate tax deductions will soon become of less significance, however, in light of changes made by the Economic Recovery Tax Act of 1981, Pub. L. No. 97-34, 95 Stat. 172. As a final point, foundations may be deterred from contributing to an organization lacking § 501(c)(3) status because foundations and their managers are subject to tax if the foundation pays any amount "to carry on propaganda, or otherwise to attempt to influence legislation." I.R.C. § 4945(a) and (d)(1).

[6] *See, e.g.*, Rev. Ruling 67-293, 1967-2 *Cum. Bull.* 185 (nonprofit organization that operates facility for protection of stray animals does not qualify for exemption if a substantial part of its activities consists of attempts to influence state and local legislation related to welfare of animals); *Kuper v. Commissioner*, 332 F.2d 562, 563 (3d Cir. 1964) (upholding disallowance of deduction for contributions to local chapter of League of Women Voters because of "the general legislative program of the League"); *League of Women*

Cir. 1930). Section 501(c)(4) organizations, on the other hand, are exempt from income taxes even if they engage in substantial lobbying. These organizations are not eligible to receive tax-deductible contributions, however.[7]

Voters v. United States, [illegible] F. Supp. 379, 383 (Ct. Cl. 1960) (forum discussions by members in formulating position to be taken on questions of public interest held to constitute "preparation for the influencing of legislation" and were therefore legislative activities). "In practice, the *in terrorem* effect of the vague statutory proscription causes many charities to avoid most direct or indirect efforts to support or oppose legislation, even when the legislation is directly related to the charitable purposes for which they are organized and operated." Caplin & Timbie, *Legislative Activities of Public Charities*, 39 L. & CONTEMP. P. 183, 196 (Autumn 1975). This effect flowed from the inherent ambiguity of the statute. *See Krohn v. United States*, 246 F. Supp. 341, 347-48 (D.Colo. 1965) (meaning of "substantial" may vary with different types of organizations, and may turn on extent of the organization's other non-charitable activities as well as the extent of its charitable activities).

Congress sought to ease this problem somewhat in the Tax Reform Act of 1976, Pub. L. No. 94-455, 90 Stat. 1720, which allows certain public charities to be governed by new Code sections 501(h) and 4911. These allow the organization to devote a percentage of its resources to lobbying, and thus provide explicit dollar ceilings on lobbying rather than requiring the organization to adhere to the less certain "substantiality" test of Section 501(c)(3). All charities, however, continue to have their lobbying restricted under one standard or the other. "Taxation has not made, and does not plan to make, an election to be covered by the new provisions." Taxation Brief at 27 n.9. The new standard is accordingly not before us and is of little relevance to the discussion below. *But see* note 40 *infra*.

[7] Section 501(c)(4) applies to:

> Civic leagues or organizations not organized for profit but operated exclusively for the promotion of social welfare, or local associations of employees, the membership of which is limited to the employees of a designated person or persons in a particular municipality, and the net earnings of which are devoted exclusively to charitable, educational, or recreational purposes.

In contrast, other Section 501(c) organizations may receive tax-deductible contributions without regard to any lobbying limitation. Contributions to certain cemetery or burial companies, which are exempt under Section 501(c)(13), are deductible under Section 170(c)(5) without explicit statutory limitations concerning lobbying activities.[8] The same is true of contributions to the federal or state governments for exclusively public purposes. *See* Section 170(c)(1). Labor unions and business leagues are exempt under Sections 501(c)(5) and 501(c)(6) respectively, even if lobbying is their primary purpose. Contributions to such organizations, usually in the form of dues, generally are deductible only to the extent they are "business expenses."[9]

Analysis of where other Section 501(c) organizations fall in this scheme is complicated by the fact that IRS regulations may impose lobbying limitations even when the Code itself is silent. Fraternal beneficiary societies that operate through local lodges and meet certain other requirements, for example, are exempt under Section 501(c)(8).[10] Although contributions to such societies are

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[8] Such companies must be barred by their charters, however, from engaging in any other activities. I.R.C. § 170(c)(5).

[9] These sections thus track I.R.C. § 162(e), described in more detail at pp. 33-34 *infra*. Section 162(e) was enacted by Congress in 1962 to allow businesses to deduct the costs of lobbying directly related to legislation of interest to the taxpayer. If Section 501(c)(5) and (6) organizations use dues for lobbying, the dues are deductible by contributors only to the extent that the requirements of Section 162(e) are satisfied.

[10] Section 501(c)(8) and (10) provide for exemption of

> (8) Fraternal beneficiary societies, orders, or associations—
>
> (A) operating under the lodge system or for the exclusive benefit of the members of a fraternity itself operating under the lodge system, and

tax-deductible only if the contributions are to be used for the group's exempt purposes, the statute imposes no lobbying restriction for gift or income tax purposes, but does for estate tax purposes. *Compare* I.R.C. § 2055(a)(3) (explicit limitation for estate tax purposes) *with* I.R.C. § 2522(a)(3) (no restriction for gift tax purposes) *and* I.R.C. § 170(c)(4) (no restriction for income tax purposes). Treasury Regulations appear to fill this gap, however. The regulations provide that a charitable fund operated by a fraternal beneficiary society will not qualify for tax-deductible contributions under these provisions if the society is an "action organization," which includes organizations that engage in substantial lobbying. Treas. Reg. § 1.501(c)(3)-1(c)(3). *See, e.g., id.* § 25.2522(a)-1(a)(4) (gift tax deductions); *id.* § 1.170A-1(h)(5) (income tax deductions); *id.* § 2055(a) (estate tax deductions). Despite the impression given by the statute alone, then, fraternal beneficiary societies resemble Section 501(c)(3) organizations because they are barred by regulation from using tax-deductible contributions to engage in substantial lobbying.

Veterans' organizations, which are exempt under Section 501(c)(19), require even closer analysis than fraternal beneficiary societies. Unlike Section 501(c)(3) organizations, veterans' organizations are not subjected to a lobbying limitation as a prerequisite for receiving tax-deductible contributions. *See, e.g.*, I.R.C. § 170(c)(3)

(B) providing for the payment of life, sick, accident, or other benefits to the members of such society, order, or association or their dependents.

. . . .

(10) Domestic fraternal societies, orders, or associations, operating under the lodge system—

(A) The net earnings of which are devoted exclusively to religious, charitable, scientific, literary, educational, and fraternal purposes, and

(B) which do not provide for the payment of life, sick, accident, or other benefits.

(income tax deductions); I.R.C. § 2055(a)(4) (estate tax deductions); I.R.C. § 2522(a)(4) (gift tax deductions). Again, however, Treasury Regulations condition exemption from income taxes on whether such groups devote themselves "exclusively" to certain veterans' functions. *See* Treas. Reg. § 1.501(c)(19)-1. Moreover, the Treasury regulations seem to require that veterans' groups obey a lobbying limitation in order to enable their contributors to deduct donations for income tax purposes, *id.* § 170A-1(h)(5), if not for estate or gift tax purposes. In practice, however, veterans' organizations enjoy very different tax treatment. Counsel for the government candidly admitted during oral argument that the regulation governing deductibility of contributions for income tax purposes is not enforced with regard to veterans groups, and the IRS has stated that it will not challenge income tax deductions taken with regard to donations made to these groups. IRS Publication No. 78, Cumulative List of Organizations Described in Section 170(c) of the Internal Revenue Code of 1954 (1980).

B. *Consequences Suffered by Taxation*

The effect of the statutory scheme, with regulations engrafted, is that different exempt organizations receive disparate tax treatment depending on their lobbying activities. Section 501(c) runs the gamut from organizations that may lobby but receive no tax-deductible contributions, *e.g.*, Section 501(c)(4); organizations that may receive tax-deductible contributions but may not lobby, *e.g.*, Section 501(c)(3); and organizations that in practice may do both, *i.e.*, veterans' organizations under Section 501(c)(19). An organization such as Taxation may not receive tax-deductible contributions if it engages in "substantial" lobbying, but a qualifying veterans' organization may continue to receive tax-deductible contributions even if it lobbies as much and on as many issues as it chooses.

Perhaps as a result of this uneven treatment, veterans' groups such as the American Legion and the Veterans of Foreign Wars are active before Congress on a large number of different issues. The American Legion and its affiliates "have historically been among the most active lobbying organizations on the national scene." Troyer, *Charities, Law-Making, and the Constitution: The Validity of the Restrictions on Influencing Legislation*, 31 N.Y.U. INST. ON FED. TAX. 1415, 1439 (1973). Veterans' organizations have sought to influence legislation involving ratification of the Panama Canal treaties, Alaska national parks, national security issues, and elimination of Saturday mail delivery.[11] But a § 501(c)(3) charitable organization, such as one formed to promote health care, may not engage in substantial

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[11] *See, e.g., Inclusion of Alaska Lands: Hearings Before the Subcommittee on General Oversight and Alaska Lands of the House Committee on Interior and Insular Affairs*, 95th Cong., 1st Sess. 100 (1977) (statement of Delmar L. Shull, VFW); *Six-Day Mail Delivery: Hearings Before the House Committee on the Post Office and Civil Service*, 95th Cong., 1st & 2d Sess. 197 (1977-1978) (statement of Spike Brooker, Commander, Post 58, American Legion); *id.* at 216 (statement of Robert Copenbarger, VFW Post of El Paso); *Postal Service Act of 1977: Joint Hearings Before the Subcommittee on Postal Operations and Services and Subcommittee on Postal Personnel and Modernization of the House Committee on the Post Office and Civil Service*, 95th Cong., 1st Sess. 103 (1977) (statement of James F. O'Neil, publisher, American Legion magazine); *id.* at 106 (statement of Donald H. Schwab, director national legislative service, VFW); *Department of Defense Appropriations for 1977: Hearings Before a Subcommittee of the House Committee on Appropriations*, 95th Cong., 2d Sess., pt. 8, 685-710 (1978) (National Security Resolution adopted by the 59th National Convention of the American Legion supporting, inter alia, development of the B-1 bomber, M-X missile, cruise missiles, and reestablishment of selective service system). Veterans' organizations have even lobbied on matters that presumably have special interest to organizations such as Taxation. *E.g., Tax Simplification Proposals: Field Hearings Before the Subcommittee on Oversight of the House Committee on Ways and Means*, 95th Cong., 1st & 2d Sess. 234 (1977-1978) (statement of James Lund, VFW).

lobbying even when the legislation relates directly to its exempt purpose, say a bill for the construction of more hospitals.

Two preliminary arguments, which could be said to concern standing, should be addressed before turning to the central issues of this case. First, the government notes that because a charitable organization may be exempt from payment of income taxes under Section 501(c)(4) even if it engages in substantial lobbying, Section 501(c)(3) in no way constitutes a direct governmental interference with Taxation's lobbying. Supplemental Brief for Appellee United States (IRS Supp. Brief) at 14. The implication is that Taxation has suffered no injury from denial of Section 501(c)(3) status because the provisions of the Code "neither restrict Taxation's lobbying activities nor deny Taxation tax exempt status because of its planned activities." *Id.* As the description of the statutory scheme shows, however, disparate tax benefits depend on the specific statutory provision under which an organization is determined to be exempt from federal income tax. Taxation's lack of Section 501(c)(3) status causes it substantial disadvantages, notably exclusion from the IRS "Cumulative List" of organizations entitled to receive tax-deductible donations and foundation grants.[12] "[A]ppearance on

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[12] IRS Publication No. 78, Cumulative List of Organizations Described in Section 170(c) of the Internal Revenue Code of 1954 (1980) (periodically updated). "The listing of an organization in [the Cumulative List] signifies it has received a ruling or determination letter . . . stating that contributions by donors to the organization are deductible as provided in section 170 of the Code." Rev. Proc. 72-39, 1972-2 *Cum. Bull.* 818. "The Service has announced that, with narrowly limited exceptions, a donor may rely on the Cumulative List for so long as the beneficiaries of his largesse maintain their listing, regardless of their actual tax status." *Bob Jones University v. Simon*, 416 U.S. 725, 729 (1974). An organization's loss of this status, and "the crucial right to receive deductible contributions," is "tantamount to a death sentence." Caplin

the Cumulative List is a prerequisite to successful fund raising for most charitable organizations. Many contributors simply will not make donations to an organization that does not appear on the Cumulative List." *Bob Jones University v. Simon*, 416 U.S. 725, 729-30 (1974). It is therefore irrelevant to Taxation's case that it might lobby substantially and still be exempt from payment of income taxes under Section 501(c)(4).[13]

A second preliminary argument suggested by the government is related to the first. Because the chief effect of Taxation's refusal to comply with the "no substantial lobbying" clause of Section 501(c)(3) is that its contributors may not make tax deductible contributions, the government implies that Taxation is not the proper party to bring this case. IRS Supp. Brief at 19. "The attenuated effect on Taxation of denying a deduction to its potential contributors" is said not to constitute a "significant encroachment" or "serious infringement" of Taxation's right to lobby, *id.*, and "does not infringe Taxation's First Amendment rights," *id.* at 26. The argument too may be easily dismissed. Taxation has stand-

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& Timbie, *supra* note 6, at 195. "From the practical point of view, charities are not very much concerned about their own taxes. . . . It is, however, vital that they qualify as exempt charities in order that donors may deduct contributions made to them." Clark, *The Limitation on Political Activities: A Discordant Note in the Law of Charities*, 46 VA. L. REV. 439, 445-46 (1960).

[13] It is far from clear, however, that Taxation could seek tax-exempt status as a social welfare organization after denial of Section 501(c)(3) status. In 1976, Congress provided that a Section 501(c)(3) organization that forfeits its exemption by lobbying may not then qualify as a social welfare organization under Section 501(c)(4). See I.R.C. § 504. Congress enacted that provision to prevent a Section 501(c)(3) organization from "build[ing] up an endowment out of deductible contributions as a charitable organization and then us[ing] that tax-favored fund to support substantial amounts of lobbying as a section 501(c)(4) social welfare organization." S. REP. No. 938, pt. 2, 94th Cong., 2d Sess. 83, *reprinted in* [1976] U.S. CODE CONG. & AD. NEWS 4030, 4107-08.

ing to raise First Amendment claims on behalf of its members and supporters,[14] and it is clearly evident that Taxation will be harmed if its contributors cease giving it money. Regardless of the merits of its case, Taxation undoubtedly is an appropriate party to bring this action.

In short, Taxation has complained that Section 501(c) exposes the lobbying of various tax-exempt groups to discriminatory tax treatment and thereby violates Taxation's First Amendment and equal protection rights. The statutory provision effectively limits the ability of charitable organizations to present to legislators their views on legislation even when the legislation directly affects their charitable objects. There is a difference, of course, between showing that a statute has a discriminatory application and that it is unconstitutional. But Taxation has met the threshold requirement of demonstrating injury from the unequal application of a statute,[15] and it is to the constitutionality of that statute we now turn.

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[14] *See, e.g., NAACP v. Alabama*, 357 U.S. 449, 458 (1958) (an organization may assert, on behalf of its members, certain of their First Amendment rights); *Bates v. Little Rock*, 361 U.S. 516, 523 n.9 (1960). In *Buckley v. Valeo*, 424 U.S. 1, 12 (1976), the Court held that appellants had standing to challenge a limitation of $1,000 on individual contributions. The limitation "precludes most associations from effectively amplifying the voice of their adherents" and "is simultaneously an interference with the freedom of [their] adherents." *Id.* at 22 (quoting *Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957) (plurality opinion)).

[15] The government also makes the astounding argument that "discrimination" is not shown simply because of "disparities in the treatment accorded somewhat similarily situated taxpayers—particularly organizations exempt from tax under different provisions of the Code," and that "the federal tax laws pertaining to the lobbying activities of tax exempt organizations are not less 'neutral' now" than they were in 1959, before Congress enacted Section 162(e). IRS Supp. Brief at 24. The Supreme Court has soundly repudiated the contention that the demands of equal protection are met when the law applies equally to all within the statutory class:

II. The Appropriate Standard of Review

The starting point for our review must be determination of the appropriate standard to apply in reviewing appellant's constitutional claims. *See Harris v. McRae*, 448 U.S. 297, 322 (1980). We find that a high level of scrutiny is required because the lobbying restriction of Section 501(c)(3) constitutes a limitation on protected First Amendment activity, and because Taxation's equal protection argument therefore involves what is clearly a

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application among the members of the class defined by Judicial inquiry . . . does not end with a showing of equal the legislation. The courts must reach and determine the question whether the classification drawn in a statute are reasonable in light of its purpose . . . .

McLaughlin v. Florida, 379 U.S. 184, 191 (1964). *See Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 541 (1942); *Rinaldi v. Yeager*. 384 U.S. 305, 308-09 (1966).

The dissent suggests that Congress has limited the lobbying and political activities of the nation's more prominent veterans' groups by incorporating them with federal charters that "uniformly contain provisions barring them from engaging in partisan political activity . . . ." Dissent at 33-34. This raises several questions of fact not addressed by the district court, including which of the nation's 22,000 veterans' organizations have such charters and whether these charters are actually enforced. The Veterans of Foreign Wars, for example, does not seem to have charter limitations on its political activities. *See* 36 U.S.C. § 111 *et seq.* (1976). Indeed, the VFW endorsed a presidential candidate in the 1980 election. *See* "The Republicans in Detroit; Veterans' Group Endorses Reagan," Washington Post, July 17, 1980, at A11. Moreover, the fact that some veterans' organizations are federally chartered does not distinguish them from section 501(c)(3) organizations, which may also have federal charters. *See, e.g.*, 36 U.S.C. § 1 (1976) (American National Red Cross); *id.* § 21 (Boy Scouts of America); *id.* § 271 (Future Farmers of America); *id.* § 371 (United States Olympic Committee); *id.* § 461 (National Safety Council); *id.* § 881 (Big Brothers of America). Indeed, the juxtaposition of veterans' organizations and section 501(c)(3) organizations throughout this title illustrates the essential similarity of these "private corporations established under Federal law." *Id.* § 1101.

fundamental right.[16] In analyzing the differential treatment challenged here, the question then must be whether a substantial governmental interest supports the classification and whether the classification is narrowly drawn to serve that interest.

A. *First Amendment Implications*

There is no question whatsoever that lobbying comes within the protection of the First Amendment. *See, e.g., California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508, 510-11 (1972); *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964); *Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 137-38 (1961). It is also beyond dispute that First Amendment freedoms are fundamental rights in our society. *See, e.g., Schad v. Borough of Mount Ephraim*, —— U.S. ——, 49 U.S.L.W. 4597, 4599 (1981); *Central Hudson Gas & Electric Corp. v. Public Service Comm'n*, 447 U.S. 557, 565 (1980). Were this a case in which the government sought to suppress the lobbying activities of Taxation directly, the appropriate level of scrutiny would be obvious. *See, e.g., N.A.A.C.P. v. Button*, 371 U.S. 415, 438-39 (1963); *Bates v. Little Rock*, 361 U.S. 516, 524 (1960).

First Amendment rights are not abridged, however, merely because the government refuses to subsidize those rights. In *Cammarano v. United States*, 358 U.S. 498 (1959), the Supreme Court upheld Treasury regulations that prohibited business deductions of lobbying expenses on the ground that governmental refusal to underwrite lobbying costs does not violate the First Amendment. *See*

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[16] Because the challenged classification is created by federal statutes, the equal protection guarantees of the Fifth Amendment rather than the Fourteen Amendment apply. *See, e.g., Buckley v. Valeo*, 424 U.S. 1, 93 (1976); *Weinberger v. Wiesenfeld*, 420 U.S. 636, 638 n.2 (1975); *Johnson v. Robison*, 415 U.S. 361, 364 n.4 (1974); *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954).

Harris v. McRae, 448 U.S. at 318 (whether Congress should subsidize the exercise of a fundamental constitutional freedom is "not a matter of constitutional entitlement").[17] For the same reasons, in *"Americans United" Inc. v. Walters*, 477 F.2d 1169, 1182 (D.C. Cir. 1973), *rev'd on other grounds sub nom. Alexander v. "Americans United" Inc.*, 416 U.S. 752 (1974), this court followed *Cammarano* in dismissing the appellants' claim that Section 501(c)(3)'s lobbying restriction violated the First Amendment on its face.[18]

Taxation makes a valiant attempt to avoid these holdings by claiming that the lobbying restriction of Section 501(c)(3) constitutes an "unconstitutional condition" on the exercise of its First Amendment rights. In *Perry v. Sindermann*, 408 U.S. 593, 597 (1972), the Supreme Court explained that "even though a person has no 'right' to a valuable governmental benefit and even though the

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[17] This statement was made in the context of only the first of several constitutional arguments rejected in *McRae*, that congressional restriction of the availability of certain medically necessary abortions under Medicaid impinged on the liberty interests protected by the Due Process clause as recognized in *Roe v. Wade*, 410 U.S. 113 (1973), and its progeny. See 448 U.S. at 312. The Court elaborated the theme later in the opinion: "It cannot be that because government may not prohibit the use of contraceptives . . . or prevent parents from sending their child to a private school . . ., government, therefore, has an affirmative constitutional obligation to ensure that all persons have the financial resources to obtain contraceptives or send their children to private schools." *Id.* at 318.

[18] In reversing, the Supreme Court held simply that Americans United's request for injunctive relief requiring reinstatement of its tax-exempt status was barred by the Anti-Injunction Act's prohibition against suits "for the purpose of restraining the assessment or collection of any tax." 416 U.S. at 757 (quoting I.R.C. § 7421(a)). The Court did not discuss the merits of appellants' case, other than noting that "[t]he consequences of the present regime for § 501(c)(3) organizations can be harsh indeed . . . ." *Id.* at 763 n.14. *See id.* at 782 (Blackmun, J., dissenting) (implying no opinion on merits of underlying controversy, but agreeing with court of appeals that case presented a substantial constitutional question).

government may deny him the benefit for any number of reasons," the government "may not deny a benefit to a person on a basis that infringes his constitutionally protected interests—especially, his interest in freedom of speech." *Accord, McDaniel v. Paty*, 435 U.S. 618, 626 (1978); *Pickering v. Board of Educ.*, 391 U.S. 563, 568 (1968); *Shelton v. Tucker*, 364 U.S. 479, 485-86 (1960); *Tygrett v. Barry*, 627 F.2d 1279 (D.C. Cir. 1980). *Cf. Speiser v. Randall*, 357 U.S. 513, 518 (1958) ("conditions imposed upon the granting of privileges or gratuities must be 'reasonable' "). The Supreme Court's decisions "have prohibited conditions on public benefits . . . which dampen the exercise generally of First Amendment rights, however slight the inducement to the individual to forsake those rights." *Elrod v. Burns*, 427 U.S. 347, 358 n.11 (1976) (plurality opinion). Taxation could enjoy the "public benefits" of Section 501(c)(3), provided it did not exceed a "substantial" level of lobbying. Because Section 501(c)(3) expressly conditions receipt of these benefits on a charity's willingness to refrain from a greater level of expression, Taxation contends, an unconstitutional condition has been placed on the furnishing of these tax benefits. "The Government has no obligation whatever to grant tax advantages to charities, but if it decides to do so, it cannot condition receipt of the advantages on a surrender of First Amendment rights." Brief for Appellant Taxation (Taxation Brief) at 21.

This argument has some strength, but we reject its premise. It is true that under certain conditions, the indirect aid granted through tax exemptions and deductions is the functional equivalent of a direct government payment.[19] *See Committee for Public Education and*

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[19] *See, e.g.*, Surrey & McDaniel, *The Tax Expenditure Concept and the Budget Reform Act of 1974*, 17 B.C. INDUST. & COMM. L. REV. 679 (1979); *cf.* Dodyk, *The Tax Reform Act of 1969 and the Poor*, 71 COLUM. L. REV. 758 (1971). The government accepts the

Religious Liberty v. Nyquist, 413 U.S. 756, 790-91 (1973) (declaring a tax benefit system invalid under the Establishment Clause); *Green v. Connally*, 330 F. Supp. 1150, 1156-57 (D.D.C.), *aff'd mem. sub nom. Coit v. Green*, 404 U.S. 997 (1971) (§ 501(c)(3) may not be used to benefit racially discriminatory private schools). "To deny an exemption to claimants who engage in certain forms of speech is in effect to penalize them for such speech. Its deterrent effect is the same as if the State were to fine them for this speech." *Speiser v. Randall*, 357 U.S. at 518. Taxation's argument would therefore be troublesome if it were the case that the government conditioned its provision of tax benefits on a charitable organization's waiver of First Amendment rights.[20]

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analogy between tax exemptions and direct governmental subsidies for purposes of this case, while cautioning that they have different characteristics. IRS Supp. Brief at 11 n.12. *See, e.g., Walz v. Tax Commission*, 397 U.S. 664 (1970), which held that a property tax exemption for religious organizations does not violate the Establishment Clause of the First Amendment, there being no "genuine nexus between tax exemption and establishment of religion." In *Marker v. Shultz*, 485 F.2d 1003 (D.C. Cir. 1973), this court held that tax exemptions for unions under Section 501(c)(5) did not constitute state involvement and prohibited support for union political activities. "A tax exemption is consistent with a 'benevolent neutrality' and government non-involvement with the exempted organization." *Id.* at 1006. *See Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 173 (1972) (state provision of necessary services such as police and fire protection, given to everyone without connotation of approval, does not constitute fostering or encouragement of racial discrimination).

[20] If this were the case, we would be forced to decide whether the restrictions on charities that received benefits under Section 501(c)(3) were both important and necessary to assure that the objects of the benefit program were attained. *See, e.g., Buckley v. Valeo*, 424 U.S. 1, 57 n.65 (1976) (Congress may condition candidates' receipt of federal financing on agreement to abide by limitations on overall campaign expenditures); *Civil Service Comm'n v. National Ass'n of Letter Carriers*, 413 U.S. 548 (1973) (upholding restriction of political activity by federal employees). Taxation

It is overly mechanistic, however, to suggest that the Section 501(c)(2) lobbying restriction actually is a condition on the receipt of tax benefits by charities. A group such as Taxation can easily structure itself along dual lines, under both Sections 501(c)(3) and 501(c)(4) of the Code, using the latter organization only for lobbying purposes.[21] Because Section 501(c)(4) organizations may lobby freely without losing the tax benefits for which they qualify, the use of both subsections accords a charitable organization full tax benefits *other than* the ability to lobby with tax-deductible contributions—and this distinction is entirely permissible under *Cammarano*. Charitable organizations are simply not required to waive their First Amendment rights in order to obtain public benefits —they simply may not lobby with tax-deductible contributions—and Taxation's "unconstitutional condition" argument must therefore fail.

As we observed at the outset, then, Taxation has no compelling claim based solely on the First Amendment.[22] We reject "the notion that First Amendment rights are somehow not fully realized unless they are subsidized by

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makes a strong argument that lobbying activities are not inconsistent with charitable purposes, *see, e.g.*, 2 RESTATEMENT (SECOND) OF TRUSTS § 374 (1959); IV R.W. SCOTT, THE LAW OF TRUSTS § 374 (3d ed. 1967), but our disposition of Taxation's First Amendment claim makes it unnecessary to consider this argument.

[21] As noted above, *see* note 1 *supra*, Taxation in fact originally followed this dual organizational structure. Although a Section 501(c)(3) organization may be barred from converting to a Section 501(c)(4) organization, *see* note 13 *supra*, nothing keeps such an organization from forming a *new* arm at any time and using non-deductible contributions made to it for lobbying purposes.

[22] Taxation does not challenge the proscription against "substantial lobbying" on grounds of vagueness, however, and that question is not considered in this opinion. *See* Borod, *Lobbying for the Public Interest*, 42 N.Y.U. L. REV. 1087, 1106-10 (1967); Clark, *supra* note 12, at 451-54; Troyer, *Charities, Law-Making, and the Constitution: The Validity of Restrictions on Influencing Legislation*, 31 N.Y.U. INST. ON FED. TAX 1415, 1456-62 (1973).

the State." *Cammarano v. United States*, 358 U.S. at 515 (Douglas, J., concurring). We also reject Taxation's 'unconstitutional condition' argument, because charitable organizations are governed by no conditions other than those upheld in *Cammarano*. Taxation has not shown that Section 501(c)(3)'s lobbying restriction abridges its First Amendment rights.

B. *Equal Protection Implications*

Our discussion of Taxation's First Amendment claims does not resolve the appropriate standard of review, because this is not a situation in which the government refuses impartially to subsidize *all* lobbying activities. Although the government need not subsidize the exercise of First Amendment rights, the question remains the appropriate standard of review when government subsidizes the exercise of First Amendment rights in a discriminatory fashion.[28]

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[28] It may be misleading to treat First Amendment and equal protection questions as though they were entirely separate, however. In cases such as this, there is a distinct interplay between these two constitutional principles. *See* Emerson, *The Affirmative Side of the First Amendment*, 15 GA. L. REV. 795, 802-03, 819 (1981) (discussing "an equal protection element in the first amendment guarantee" in the context of governmental subsidies for speech). "The peculiar identity of equal protection and first amendment analyses in differential access cases follows logically from the explicit constitutional designation of speech as fundamental and from the fact that the first amendment's proscription against censorship is itself simply a specialized equal protection guarantee." *Perry Local Educators' Ass'n v. Hohlt*, 652 F.2d 1286, 1296 (7th Cir. 1981). *See* Kavst, *Equality as a Central Principle in the First Amendment*, 43 U. CHI. L. REV. 20 (1975). The Supreme Court has recognized this interplay many times. *See, e.g., Carey v. Brown*, 447 U.S. 455, 460-61, 466-71 (1980); *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503, 510-11 (1969) (although classrooms are not public forums, rule prohibiting students from wearing armbands in protest of the Vietnam War struck down in part because school did not prohibit wearing of other symbols of political significance).

In *Speiser v. Randall*, 357 U.S. 513, 518 (1958), the Supreme Court held that discriminatory denial of tax exemptions for engaging in speech can impermissibly infringe First Amendment rights. *Speiser* concerned a California statute that conditioned property tax exemptions on the taking of a loyalty oath. The Court held that even though the statute involved merely the discriminatory denial of tax *exemptions*, and not the direct suppression of speech, a strict level of scrutiny was appropriate. "When we deal with the complex of strands in the web of freedoms which make up free speech, the operation and effect of the method by which speech is sought to be restrained must be subjected to close analysis and critical judgment in the light of the particular circumstances to which it is applied." *Id.* at 520. After conducting this close analysis, the Court concluded that California "clearly has no such compelling interest at stake" as would justify the operation of the statute. *Id.* at 529.[24]

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[24] Although it could be suggested that *Speiser* should be understood as striking down a statute "frankly aimed at the suppression of dangerous ideas," 357 U.S. at 519, and therefore inapposite here, that interpretation conflicts with the approach taken by the Court. *Speiser* was decided in 1958, soon after the decision in *Dennis v. United States*, 341 U.S. 494 (1951). The California statute was an attempt to enforce Article XX, § 19, of the California Constitution, which denied tax exemptions to any "person or organization which advocates the overthrow of the Government of the United States or the State by force or violence," *see* 357 U.S. at 516. The Court explicitly refused to reach the question of whether "California may deny tax exemptions to persons who engage in the proscribed speech for which they might be fined or imprisoned." *Id.* at 520. Instead, the Court applied strict scrutiny to the "procedural safeguards" and "burden of proof" established by the statute, *id.* at 521, and found that "this allocation of the burden of proof, on an issue concerning freedom of speech, falls short of the requirements of due process." *Id.* at 523. Although it may be correct that an underlying hostility to the California sedition law actually explains *Speiser*, *see Pennsylvania v. Nelson*, 350 U.S. 497 (1956), the Court itself was careful to decide the case in light of the strict scrutiny that must be applied to discriminatory tax treatment that implicates *any* First Amendment rights.

Although *Speiser* was decided a year earlier than *Cammarano*, nothing in the later case repudiates this ruling. Indeed, Justice Harlan's opinion for the Court in *Cammarano* carefully distinguished the earlier decision:

> *Speiser* has no relevance to the cases before us. Petitioners are not being denied a tax deduction because they engage in constitutionally protected activities, but are simply being required to pay for those activities entirely out of their own pockets, *as everyone else engaging in similar activities is required to do* under the provisions of the Internal Revenue Code. *Nondiscriminatory* denial of deduction from gross income to sums expended to promote or defeat legislation is plainly not " 'aimed at the suppression of dangerous ideas.' " 357 U.S., at 519. Rather, it appears to us to express a determination by Congress that since purchased publicity can influence the fate of legislation which will affect, directly, or indirectly, all in the community, *everyone in the community should stand on the same footing* as regards its purchase so far as the Treasury of the United States is concerned.

358 U.S. at 513 (emphasis added). The Court's emphasis on "nondiscriminatory" denial of benefits clearly distinguishes *Cammarano* from this case. *Cammarano* and *Speiser* are therefore consistent in requiring a strict standard of review for situations in which the government grants tax exemptions affecting First Amendment rights on a discriminatory basis.

This court's previous decisions explicitly adopt this reading of the relationship between *Speiser* and *Cammarano*. In *"Americans United" Inc. v. Walters*, 477 F.2d 1169, we held that the appellants' claim that Section 501(c)(3)'s lobbying restriction was unconstitutionally discriminatory raised a substantial constitutional question:

> *Cammarano*, while disposing of appellants' claim that first amendment rights are violated by the questioned statute, does not attempt to deal with possible discriminatory conduct. . . . Americans United, on the other hand, alleges just that discriminatory conduct found lacking in *Cammarano*. . . .
>
> If discrimination exists here it relates to the exercise of the most fundamental of rights, those protected by the first amendment . . . . This is neither a frivolous challenge nor one which, as of the writing of this opinion, has been foreclosed by the Supreme Court.

Id. at 1182-83.[23] *See Big Mama Rag, Inc. v. United States*, 631 F.2d 1030, 1034 & n.7 (D.C. Cir. 1980); *Haswell v. United States*, 500 F.2d 1133, 1147-48 (Ct. Cl. 1974), *cert. denied*, 419 U.S. 1107 (1975). Similarly, in *Community-Service Broadcasting of Mid-America, Inc. v. FCC*, 593 F.2d 1102 (D.C. Cir. 1978) (en banc), this court invalidated a requirement that noncommercial educational stations record and maintain copies of broadcasts on issues of public importance because

> where noncontent-based distinctions are drawn in a statute affecting First Amendment rights, the Supreme Court has held that the government interest served must be "substantial" and the statutory classification "narrowly tailored" to serve that interest if the statute is to withstand equal protection scrutiny.

Id. at 1122; *see id.* at 1111.

The case before us arguably differs from *Community Service* and even *Speiser* in the sense that it involves unequal levels of governmental subsidy of First Amendment rights, rather than a more intrusive governmental

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[23] It should be noted, however, that appellant in *"Americans United"* dropped its First Amendment claims on appeal. *See* 477 F.2d at 1181 ("at oral argument and in its Reply Brief it has narrowed its focus, and we believe wisely so, to the 'discriminatory' aspects of § 501(c)(3)").

restriction of those rights. The question apparently remains open whether courts may adopt a different level of scrutiny in cases of this sort, one that is somewhat less searching than the scrutiny applied when the government directly bans First Amendment expression. *See Perry Local Educators' Ass'n v. Hohlt*, 652 F.2d 1286, 1296-97 (7th Cir. 1981) (suggesting existence of sliding scale that "may vary with the particular right in question"). It is not necessary to decide whether, in view of the nature of the inhibition of Taxation's First Amendment rights, the appropriate level of review is the most stringent courts employ. It is certainly inadequate simply to ask whether the classifications at issue in this case "bear some rational relationship to a legitimate state end." *McDonald v. Board of Election Commissioners*, 394 U.S. 802, 809 (1969). Plainly, this case is not like *Cammarano*, in which the indirect burdens on First Amendment expression fell equally on all. Only a heightened scrutiny test fully accords with decisions in other cases.[26] Indeed, our analysis must be guided by *Buckley*

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[26] Judge Wisdom's comments in *Perry Local Educators' Ass'n v. Hohlt*, 652 F.2d 1286 (7th Cir. 1981), which concerned an analogous equal-access claim by a union to use a school board's internal mail system already being used by another union, are instructive:

> Despite the sweeping language of *Mosley* quoted above, other Supreme Court cases demonstrate that it is not invariably true that the government may never discriminate among constitutionally protected speech on the basis of its content or on the basis of the speaker, nor even that all such discrimination must always be scrutinized with equal strictness. Because a majority of the Court were unable to agree on any one rationale in some of these cases, it is not always easy to determine the appropriate standard of review. Even interpreting the cases in the way most favorable to the defendants, however, they require rigorous scrutiny to be applied here. . . . [S]peech restrictions keyed to the identity of the speaker are always scrutinized strictly: they almost invariably are not neutral with respect to the viewpoints they tend to disfavor.

Id. at 1294-95. *National Black United Fund, Inc. v. Devine*, No. 80-2101 (D.C. Cir. Oct. 20, 1981), which rejected a claim that re-

v. Valeo, 424 U.S. 1 (1976), in which the Supreme Court heard challenges to public financing provisions for presidential campaigns that provided far greater financial support to major-party candidates. In determining the standard of review appropriate under the Fifth Amendment, the Court started from precedents holding that direct "restrictions on access to the electoral process must survive exacting scrutiny." *Id.* at 94. *See, e.g., Lubin v. Panish*, 415 U.S. 709, 718 (1974) (indigent candidates may not be required to pay filing fees absent alternative means of ballot access); *Williams v. Rhodes*, 393 U.S. 23, 31 (1968) (appearance of minor parties on ballot may not be conditioned on whether they can obtain voter petitions with signatures totaling 15 percent of the number of ballots cast in the previous gubernatorial election). These "direct burdens" were much more restrictive than discriminatory funding of presidential candidates, the Court said, thereby implying that less than "exacting scrutiny" was appropriate. *Id.* But it is

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fusal to allow participation in the Combined Federal Campaign by a nonqualifying charity abridged appellant's First Amendment rights, is not to the contrary. The opinion observed that the mere "possibility" that the voices of some charities might be amplified at the expense of others did not "compel strict scrutiny of every Commission decision," slip op. at 12, because the regulations at issue were "intended to serve interests unrelated to the suppression of speech" and were thus subject to evaluation under a different standard. *Id.* at 13. By contrast, the Section 501(c) lobbying restriction clearly was intended to regulate speech. "A rule that substantially impairs the ability of certain groups to convey their message to a desired audience, on the other hand, effectively 'abridges speech' even if it is not intended to curtail public debate. . . . Government must bear a far heavier burden of justification for such a rule. Its content-neutral interests must be 'compelling' and it must demonstrate the absence of any 'less drastic means' for achieving its purpose." *Id.* In the case now before us, even the government acknowledges that "[t]he democratic process as a whole is jeopardized where the government provides undue support to any one lobbying faction, including the class of charitable organizations." IRS Brief at 29.

highly significant that the Court went on to analyze the discriminatory funding provisions in heightened scrutiny terms. "In any event, Congress enacted Subtitle H in furtherance of sufficiently important governmental interests," *id.* at 95, because "public financing as a means of eliminating the improper influence of large private contributions furthers *a significant governmental interest.*" *Id.* at 96 (emphasis added). The standard of review we select in this case must be no lower than that applied in *Buckley*, even though neither situation involves a "direct burden" on First Amendment expression.[27] *Cf. Citizens Against Rent Control/Coalition for Fair Housing v. Berkeley*, —— U.S. ——, 50 U.S.L.W. 4071, 4072 (1981) ("regulation of First Amendment rights is always subject to exacting judicial review.").

In short, we must apply a heightened level of scrutiny to the *discriminatory* treatment of lobbying activities given by Section 501(c) to different tax-exempt groups. It may be true that "in taxation, even more than in other fields, legislatures possess the greatest freedom in

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[27] *Buckley* is directly analogous to this case because Congress had approved greater public funding of First Amendment activities for some candidates as opposed to others. *Buckley* is also distinguishable, however, in the sense that it involved less restrictive discriminations than those at issue here. The Court noted that correlative restrictions on major-party candidates helped offset the lack of full financing given to minor parties: "But since any major-party candidate accepting public financing of a campaign voluntarily assents to a spending ceiling, other candidates will be able to spend more in relation to the major-party candidates." 424 U.S. at 99. No such offsetting advantages in Section 501 for charitable groups have been suggested here. The Court also observed in *Buckley* that the "risk of harm to minority interests is speculative" because the statute had yet to go into force, *id.* at 101, and cautioned that "we of course do not rule out the possibility of concluding in some future case, upon an appropriate factual demonstration, that the public financing system invidiously discriminates against nonmajor parties." *Id.* at 97 n.131. Again, in contrast, the Section 501(c)(3) restriction on lobbying by charitable organizations has been in effect since 1934.

classification," *Madden v. Kentucky*, 309 U.S. 83, 88 (1940), but that power is not unlimited.[28] As the Su-

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[28] The government argues that no Supreme Court cases have ever held that classifications in federal tax statutes are to be measured by more than a rational basis standard, IRS Supp. Brief at 30, and that it knows of no Supreme Court cases holding a federal tax statute invalid on equal protection grounds, *id.* at 31. *See San Antonio Independent School Dist. v. Rodriguez*, 411 U.S. 1, 41 (1973) (quoting *Madden v. Kentucky*); *Lenhausen v. Lake Shore Auto Parts Co.*, 410 U.S. 356, 360 (1973) (tax statute must be "palpably arbitrary" or "invidious" to violate equal protection guarantees). These cases do not involve First Amendment claims, however, which must be measured under a more searching standard. *Speiser v. Randall*, 357 U.S. at 518.

Federal tax statutes have been overturned, however—by the Supreme Court as well as lower federal courts. *E.g., National Life Ins. Co. v. United States*, 277 U.S. 508, 520 (1928) ("The suggestion that as Congress may or may not grant deductions from gross income at pleasure, it can deny to one and give to another is specious, but unsound"); *id.* at 534 (Brandeis, J., dissentnig) ("The Court has, of course, power to declare that the system of taxation established by Congress is unconstitutional"); *Moritz v. Commissioner*, 469 F.2d 466 (10th Cir. 1972), *cert. denied*, 412 U.S. 906 (1973) (dependent care deduction provision of Code impermissibly distinguished between unmarried male and unmarried female taxpayers); *cf. Golden Rule Church Ass'n*, 41 T.C. 719, 729 (1964) ("Although tax benefits may be matters of legislative grace . . . nevertheless, a denial of such benefits granted to others of essentially the same class may well rise to the level of an unconstitutional discrimination"). Moreover, state tax classifications have been struck down for incompatibility with equal protection principles. *E.g., Iowa-Des Moines National Bank v. Bennett*, 284 U.S. 239 (1931); *cf. In re Estate of Legatos*, 1 Cal. App.3d 657, 81 Cal. Rptr. 910 (1969) (equal protection proscribes arbitrary tax classifications). In addition, despite popular conceptions, Social Security is more akin to a tax than an insurance payment. *See Califano v. Goldfarb*, 430 U.S. 199, 217-18 (1977) (Stevens, J., concurring in judgment). The Supreme Court, applying an elevated but not its most stringent standard of review, has found certain gender-based classifications in the Social Security Act unconstitutional. See *Weinberger v. Wiesenfeld*, 420 U.S. 636 (1975); *Califano v. Goldfarb, supra. See generally* Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law*, 81 HARV. L. REV. 1439, 1461 (1968) ("A minimum demand of uniformly

preme Court held in *Police Dep't v. Mosley*, 408 U.S. 92, 99 (1972), there is a profound constitutional distinction between regulating all picketing and doing so selectively. "Because picketing plainly involves expressive conduct within the protection of the First Amendment, . . . discriminations among pickets must be tailored to serve a substantial governmental interest." *See Carey v. Brown*, 447 U.S. 455, 471 (1980) (reaffirming *Mosley*); *Califor-*

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reasonable rules in the management of public largesse is surely an unexceptional requirement of constitutional government").

The government suggests that *Moritz* is a case "of questionable vitality" in light of *Kahn v. Shevin*, 416 U.S. 351, 355 (1974), in which the Supreme Court held that Florida could provide a property tax exemption for widows but not for widowers without violating equal protection guarantees. IRS Supp. Brief at 31 n.25. The two cases are clearly distinguishable, however, and even in *Kahn* the statute was upheld after a level of review showing that the differential treatment had "a fair and substantial relation to the object of the legislation." *Id.* at 355 (*quoting Reed v. Reed*, 404 U.S. 71, 76 (1971)).

It is true that almost three decades ago, this court applied a rational basis test in upholding provisions of the Subversive Activities Control Act that denied tax exemptions or deductibility of contributions to any communist-action organization, regardless of its status under I.R.C. §§ 170 and 501.

> The sanctions with reference to tax exemptions and deductions, which are in Section 11 of the Act, forbid income tax deductions for contributions to a registered organization and deny income tax exemptions to such organizations. These allowances and denials fall within the field of congressional grace so long as a reasonable basis appears. This is too well established to require citation. We think these provisions clearly valid.

Communist Party of the United States v. Subversive Activities Control Board, 223 F.2d 531, 557 (D.C. Cir. 1954), *rev'd on other grounds*, 351 U.S. 115 (1956). But this case is of doubtful authority in view of *Speiser v. Randall*, which was decided four years later. *Compare Seasongood v. Commissioner*, 227 F.2d 907, 911 (6th Cir. 1955) (construing "propaganda" to reach only coloring or distortion of facts with an ulterior motive, and holding that a Good Government League was not disqualified from receiving deductible contributions because a different construction might violate First Amendment).

nia v. LaRue, 409 U.S. 109, 138 (1972) (Marshall, J., dissenting). The issue in this case therefore becomes whether the discriminatory framework of Section 501(c) serves a substantial governmental interest and whether the statute is narrowly tailored to serve that end.

III. Constitutionality of Differential Tax Treatment of Lobbying

When *Cammarano v. United States* was decided in 1959, its foundation was the congressional "neutrality" toward lobbying that existed at the time of the decision. *See* 358 U.S. at 513.[29] Since that time, Congress has departed substantially from the policy that government should not subsidize *any* lobbying. Taxation claims that the refusal to subsidize lobbying by Section 501(c)(3) organizations to the same extent that lobbying by other Section 501(c) organizations is subsidized constitutes a violation of equal protection.

On these facts, we agree. In the starkest terms, Congress has used the Code, perhaps inadvertently, to do one of two things. If veterans' organizations and organizations such as Taxation lobby on different sides of the same questions, Congres has chosen to favor one lobbyist on a particular issue over another. If veterans' organizations and Section 501(c)(3) organizations lobby on entirely distinct matters, Congress has ensured that greater attention will be devoted to some causes than others. Either outcome is unconstitutional unless an evaluation of the differential treatment in terms of the heightened

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[29] Indeed, the IRS in *Cammarano* argued against a business deduction for lobbying expenses on the ground that it "would upset the tax equilibrium which existed due to the then existing uniform prohibition against subvention." Garrett, *Federal Tax Limitations on Political Activities of Public Interest and Educational Organizations*, 59 Geo. L.J. 561, 583 & n.38 (1971) (citing Brief for Respondents at 12, *Cammarano v. United States*, 358 U.S. 498 (1959)).

level of scrutiny appropriate here demonstrates that there is an important governmental interest justifying the First Amendment preference. We turn to that question now.

A. *State Interests Furthered by the Classification*

Before the court can determine whether a substantial governmental interest supports the differential classification under review, it must first determine what interests are said to justify the classifications. Once these interests are identified, it can then be asked whether they are substantial. The pertinent classifications made in the Code are as follows.

1. *Business lobbying*

On rehearing, Taxation has dropped its equal protection challenge to the right of businesses to deduct lobbying expenses, Taxation Supp. Brief at 18 n.3, and it has not hitherto been necessary to explain these provisions of the Code. Nevertheless, the tax treatment of business lobbying is worthy of some attention because the reasons behind that treatment exemplify the sorts of governmental interests that we seek to identify in this section of the opinion.

I.R.C. § 162(e) permits the deduction of all "ordinary and necessary expenses" incurred in carrying on any trade or business, including lobbying costs incurred in "direct connection" with "legislation or proposed legislation of direct interest to the taxpayer." [30] There is a significant difference between profitmaking and nonprofitmaking entities, and it seems probable that each type lobbies with different motives. *See Haswell v. United States*, 500 F.2d at 1150. But the fact that a difference

[30] *See* note 9 *supra*. Section 162(e) also permits businesses to deduct indirect lobbying expenditures that are paid as dues to an organization of which the taxpayer is a member, such as a trade association.

exists does not by itself demonstrate the state interest behind the distinction.

The Senate Report explaining the addition of Section 162(e) in 1962 mentions several policy considerations, however. Lobbying is a cost of doing business, and the deduction of lobbying expenses permits a more accurate measurement of a business' net income. SEN. REP. NO. 1881, 87th Cong., 2d Sess. 22-23 (1962), *reprinted in* [1962] U.S. CODE CONG. & AD. NEWS 3304, 3325. The Report mentions three other explanations: the anomaly of allowing deductions for expenses incurred in presenting a business' viewpoint to administrative agencies and the executive branch but excluding the legislative branch; the importance of some legislation to a business' continued existence; and the desirability of encouraging business people to bring relevant information to the attention of Congress. *Id.*

2. *Veterans' organizations*

It is far more difficult to identify the governmental interest that is promoted by giving veterans' organizations a lobbying advantage over other Section 501(c) organizations. Just as there are differences between business and nonbusiness groups, of course, veterans groups may be distinguished from other Section 501(c) organizations. As noted above, however, the mere fact that differences exist between any two distinct entities does not demonstrate a substantial state interest that can justify discrimination in the exercise of constitutional rights. Descriptive terms alone have little relevance in identifying the governmental interest furthered by a differential statutory classification.

The government offers only two state interests that are said to justify preferential tax treatment of lobbying by veterans' organizations. First, veterans deserve substantial benefits and rewards in return for their service to the country. These benefits "compensate them for

disruption of civilian pursuits," assist in the "readjustment to civilian life," and help "make military service more attractive." IRS Supp. Brief at 44. Second, the government suggests that legislative activity by veterans' organizations is necessary in order to protect veterans' benefits from subversion by hostile forces. "Since these benefits are provided by legislatures, it is reasonable for Congress to allow veterans' organizations to engage in lobbying activities to preserve their benefits without risk of losing their tax deductible contributions." *Id.*

In identifying the governmental interests furthered by the tax treatment of these groups, however, it must be cautioned that our effort risks becoming a post hoc attempt to rationalize an otherwise inexplicable distinction in the Code. The government made no attempt in the district court to present affidavits or other evidentiary materials. Our identification of the relevant state interests must depend on the legislative history of the statute—but that history is sparse indeed.[31] Despite the apparently unambiguous distinction drawn in the statute, there is no indication in the legislative history of these sections that Congress intended to grant any tax-exempt organization a lobbying advantage over any others. In fact, the scant legislative history that exists is to the contrary, and suggests that Congress meant to treat the lobbying of all § 501(c) organizations equally.

Tax exemptions for religious, charitable, and educational organizations—and the correlative provisions per-

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[31] *See, e.g.*, Memorandum in Support of Cross-Motion by Defendants for Summary Judgment, October 28, 1978, at 5 (legislative history is "surprisingly sparse"); Garrett, *supra* note 29, at 564 ("The statutory history of this amendment is unclear as to the underlying rationale and scope of the prohibition"); Troyer, *supra* note 22, at 1421 (legislative history of the 1934 amendment "is sparse and unclear"); Note, *Regulating the Political Activity of Foundations*, 83 HARV. L. REV. 1843, 1845 (1970) ("neither the extent of the proscription nor its rationale has ever been clearly enunciated by Congress").

mitting taxpayers to deduct their contributions to such groups—are much older than similar treatment of veterans' organizations. Not until after World War One did Congress explicitly extend these benefits to a named veterans' group. Section 214(a) of the Revenue Act of 1921, ch. 136, 42 Stat. 227, accorded exempt status to posts of the American Legion, and it is greatly suggestive that Congress in 1921 viewed the American Legion no differently than any other charitable group. Senator Lodge, who proposed the extension in the Senate, considered it one "to which I think there can be no possible objection," 61 CONG. REC. 7066 (1921), and the lack of debate bears him out. As enacted, the predecessor section to I.R.C. § 170 simply added the American Legion to other organizations, by allowing deductions for

> Contributions or gifts made within the taxable year to or for the use of: (A) The United States, any State, Territory, or any political subdivision thereof, or the District of Columbia, for exclusively public purposes; (B) any corporation, or community chest, fund, or foundation, organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes, *including posts of the American Legion or the women's auxiliary units thereof*, or for the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private stockholder or individual; or (C) the special fund for vocational rehabilitation authorized by section 7 of the Vocational Rehabilitation Act.

Section 214(a)(11), 42 Stat. 241 (emphasis added). In the beginning, then, Congress not only expected that veterans' organizations and charitable groups would be treated equally, but it included both groups in the same subsection of the tax laws.

Congress extended this tax treatment to veterans' organizations generally in 1924. Section 214(a)(10), Rev-

enue Act of 1924, ch. 234, 43 Stat. 253. By this time, however, the statute had become considerably more detailed, and Congress created a new subsection for the veterans' groups. Contributions or gifts were deductible if given to

> (A) The United States, any State, Territory, or any political subdivision thereof, or the District of Columbia, for exclusively public purposes; (B) any corporation, or community chest, fund, or foundation, organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes, or for the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private shareholder or individual; (C) the special fund for vocational rehabilitation authorized by section 7 of the Vocational Rehabilitation Act; (D) posts or organizations of war veterans, or auxiliary units or societies of any such posts or organizations, if such posts, organizations, units, or societies are organized in the United States or any of its possessions, and if no part of their net earnings inures to the benefit of any private shareholder or individual; or (E) a fraternal society, order, or association, operating under the lodge system, but only if such contributions or gifts are to be used exclusively for religious, charitable, scientific, literary, or educational purposes, or for the prevention of cruelty to children or animals.

Section 214(a)(10), 43 Stat. 271. Again, however, the legislative history creates no inference that Congress sought to treat these groups differently than charitable organizations. The change was approved without comment on the floor in either house, *see* 65 CONG. REC. 2860, 7126 (1924), and received almost no mention in the reports accompanying the revenue act. *See* S. REP. NO. 398, 68th Cong., 1st Sess. 24 (1924); H.R. REP. NO. 844, 68th Cong., 1st Sess. 18 (1924). It is also noteworthy

that Congress enacted the same restrictions concerning earnings that inured to the benefit of private individuals for both types of organizations.

The lobbying limitation on charitable organizations was not enacted until 1934, and it is true that Congress inserted it only in the subsection of the statute dealing with charitable organizations. Section 23(o)(2), Revenue Act of 1934, 48 Stat. 690. This may simply have been a drafting oversight, however. Indeed, Senator Harrison, the chairman of the reporting committee, suggested that a more carefully drafted amendment would apply to "war organizations" as well:

> In considering that amendment, as I recall, the sentiment of the committee was that the provision should apply to *any* organization that is receiving contributions, the proceeds of which are to be used for propaganda purposes or to try to influence legislation.
>
> I called the attention of the experts to the fact that it seemed to me the proviso at the end of the second paragraph [the lobbying provision] *should apply to all four paragraphs.* Of course, *that would affect some war organizations,* but personally I see no difference between one organization that might be on one side of the fence getting contributions to propagandize and influence legislation and being permitted to proceed without interference, while at the same time preventing one that might have a different viewpoint from receiving or making use of contributions for the same purpose.

78 CONG. REC. 5861 (1934) (emphasis added). Senator LaFollette, another member of the Senate Finance Committee, agreed to the desirability of uniformity:

> I recognize . . . that there are certain types of organizations to which Congress and the executive branch of the Government might desire to encourage

> contributions. . . . In my opinion, it will not make a penny's worth of difference, so far as the contributions to these various organizations are concerned, *if they are all excluded from this immunity and all treated alike.* It is my judgment that we never shall get away from mistakes of administration and from decisions which may seem like favoritism until all contributions to organizations of this kind are made subject to the income tax.

Id. at 5959. *See id.* at 5861 (Senator Reed) (stating "no disagreement" with Senator Harrison's remarks). The amendment was eventually agreed to with the understanding that it would undergo redrafting by the conference committee. *See* 78 CONG. REC. 5959 (Senator Couzens) (amendment should "go to conference, and we can change the language if it is found to do any inequity"); *id.* (Senator Reed) ("if the amendment shall be agreed to we will have from now until the conference to study the subject and prepare better phraseology"). There is no explanation in the legislative history for the fact that the language of the enacted version was identical to that of the amendment as proposed.[32]

Congress has not indicated since 1934 that it specifically wishes to impose the lobbying restriction less than uniformly, other than by enacting a Code that articulates lobbying limitations in some provisions and not others.

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[32] The legislative scheme provides further support for this broad reading of the scope of the 1934 lobbying restriction. When the limitation was enacted, it was added to all relevant portions of the Code—the section establishing an exemption for charitable organizations and the three provisions permitting deduction of charitable contributions for income, estate, and gift tax purposes. See Revenue Act of 1934, Pub. L. No. 73-216, §§ 101(6), 23(o)(2), 406, 517, 48 Stat. 700, 690, 755, 760 (current version at I.R.C. §§ 501(c)(3), 170(c)(2)(D), 2055(a)(2), 2522(a)(2)). There was no intent—and no conceivable reason—to apply the lobbying restriction to some, but not all, of the primary tax benefits accorded exempt organizations.

No stated intent to discriminate among the lobbying activities of various tax-exempt organizations is shown by the 1972 addition of Section 501(c)(19), which created a new subsection for veterans' organizations in Section 501 to correspond with the separate veterans' subsection in Section 170. The legislative history suggests that this addition was only a technical, nonsubstantive amendment designed to correct the tax treatment of certain income by veterans' organizations inadvertently changed by the Tax Reform Act of 1969.[33] There is no indication that Congress meant to benefit veterans' organizations vis-a-vis other tax exempt organizations in any respect.[34] Most importantly, in explaining the effect of the new provision the Senate Report noted: "The committee does not intend for any expenditures for lobbying purposes to come under this exception." S. REP. No. 1082, 92d Cong., 2d Sess. 5

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[33] Until 1972, veterans' organizations were themselves exempt from taxation either as social welfare organizations under Section 501(c)(4) or as social clubs under Section 501(c)(7). Until 1969, organizations exempt under these categories were not subject to the unrelated business income tax. The Tax Reform Act of 1969 extended the unrelated business income tax to these categories, however. The 1972 law therefore created a new subsection for veterans' organizations, and added Section 512(a)(4) so that the income that a veterans' organization received from insuring its members and their dependents was not subject to the unrelated business income tax. *See* S. REP. No. 1082, 92d Cong., 2d Sess. (1972); H.R. REP. No. 851, 92d Cong., 2d Sess. (1972).

[34] The 1969 extension of the unrelated business income tax, for example, had been prompted by a desire "to avoid unequal treatment of the various types of tax-exempt organizations." H.R. REP. No. 413, pt. 1, 91st Cong., 1st Sess. 44 (1969) (amending I.R.C. § 511(a)(2)(A)). The 1972 revision was based on a similar concern. *See* 118 CONG. REC. 6033 (1972) (Rep. Mills) ("the veterans' organizations should not be taxed on this insurance income since other exempt organizations are permitted to insure their members without being taxed on the income from this activity"); *id.* (Rep. Matsunaga) (bill "would place veterans' organizations in exactly the same tax position as fraternal beneficiary associations now enjoy").

(1972), *reprinted in* [1972] U.S. CODE CONG. & AD. NEWS 3141, 3145.[35] It is therefore difficult to resist the conclusion that the tax preferences for lobbying by veterans' organizations reflect no policy, but simple lack of attention and consistency on the part of Congress and the IRS.

3. *Section 501(c)(3) charitable organizations*

In addition to searching for the governmental interests promoted by preferential treatment of lobbying by veterans' organizations, we must also examine the governmental interests behind restrictive treatment of lobbying by charitable groups and other Section 501(c)(3) organizations. As the government emphasizes, Congress, when it does not impinge impermissibly upon fundamental rights, "may address a problem 'one step at a time.'" IRS Supp. Brief at 40 (quoting *Jefferson v. Hackney*, 406 U.S. 535, 546 (1972)). "[T]he Constitution permits Congress to single out the greatest problems and legislate respecting the most serious abuses, while leaving less serious problems to a later date." IRS Supp. Brief at

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[35] The government argues that this language modifies only income received from insurance activities and set aside for charitable purposes under Section 512(a). IRS Supp. Brief at 38 n.33. Even if this reading is correct, great weight should still be given to the restriction. The new rule excluded from the unrelated business income tax all insurance receipts used or set aside for insurance benefits "or for religious, charitable, scientific, literary, educational, etc., purposes" *that were then identified* as "the purposes specified in sec. 170(c)(4)." S. REP. No. 1082, at 5. These purposes, the Report said,

> are to include programs involving Americanism, youth activities, community activities, and information and educational programs relative to national security and foreign affairs for purposes of this provision.

Id. If these "purposes specified in sec. 170(c)(4" do not include lobbying when income is derived from one source, it is hard to see how they can include lobbying simply because income is derived from a different source.

42. *See Buckley v. Valeo*, 424 U.S. at 105; *Katzenbach v. Morgan*, 384 U.S. 641, 657 (1966). If the legislative history demonstrates a compelling reason for Congress to focus with particularity on special problems created by charitable lobbying with tax-deductible dollars, this might suffice to justify the differential treatment indicated in the Code sections before us.

Initially, it does seem far easier to discern the governmental interests promoted by the lobbying restriction on charitable organizations than those advanced by not extending this restriction to veterans' groups. Federal tax exemptions for religious, charitable, and educational organizations are as old as the Income Tax Act of 1894,[36] but there were no statutory limitations on the lobbying activities of exempt organizations for the next forty years. As described above, Congress amended the tax laws in 1934 to make clear that what are now Section 501(c)(3) organizations were not to engage in substantial lobbying activities. Unlike the legislation concerning veterans' organizations, the lobbying restriction was enacted only after a number of explanatory remarks by members of Congress, and this makes it seem relatively easy to identify the governmental interests promoted by the measure.

In discussing the amendment on the floor of the Senate, for example, Senator Harrison explained:

> the attention of the Senate committee was called to the fact that there are certain organizations which are receiving contributions in order to influence legislation and carrying on propaganda. The committee

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[36] Act of August 27, 1894, ch. 349, 28 Stat. 509 (held unconstitutional in *Pollock v. Farmers' Loan & Trust Co.*, 158 U.S. 601 (1895)). A similar exemption provision was included in the Income Tax Act of 1913, ch. 16, 38 Stat. 114, and subsequent revenue acts. The correlative provision permitting taxpayers to deduct contributions from their income taxes was enacted in 1917. War Revenue Act, ch. 63, 40 Stat. 297, 330 (now I.R.C. § 170).

> thought there ought to be an amendment which would stop that, so that is why we have put this amendment in the bill.

78 CONG. REC. 5959 (1934). Senator Reed, who was also a member of the reporting committee, addressed

> what we were trying to do by this amendment. There is no reason in the world why a contribution made to the National Economy League should be deductible as if it were a charitable contribution if it is a selfish one made to advance the personal interests of the giver of the money . . . .

Id. at 5861. These statements suggest that Congress acted to curb what it regarded as abuses by Section 501(c)(3) organizations then eligible to use tax-deductible contributions for lobbying activities. Based partly on these comments, the district court below articulated three "legitimate governmental purposes" served by the lobbying restriction: "assurance of governmental neutrality with respect to the lobbying activities of charitable organizations; prevention of abuse of charitable lobbying by private interests; and preservation of a balance between the lobbying activities of charitable organizations and those of non-charitable organizations and individuals." Memorandum Order, J.A. 62.

It would be grossly simplistic to read too much into these comments, however. Legislation is never passed in a vacuum, and any genuine understanding of its purpose must take some account of what conditions were before it was enacted. There is an early history of restrictions on political activity by charitable organizations well preceding the 1934 statutory change. In 1919, for example, the Treasury provided by regulation that "associations formed to disseminate controversial or partisan propaganda are not educational within the meaning of the statute." Treas. Reg. 45, art. 517 (1919), in T.D. 2831, 21 TREAS. DECS. INT. REV. 285 (1920). The principle

was successfully applied in several cases before the Board of Tax Appeals in the 1920s,[37] and was central to Judge Learned Hand's opinion in *Slee v. Commissioner*, 42 F.2d 184 (2d Cir. 1930):

> Political agitation as such is outside the statute, however innocent the aim, though it adds nothing to dub it "propaganda," a political word used to decry the publicity of the other side. Controversies of that sort must be conducted without public subvention; the Treasury stands aside from them.

Id. at 185. Obviously, because of the close connection in the statute between veterans' organizations and other charitable groups, the regulations and judicial pronouncements presumably applied to veterans' organizations too.

These restrictions on political activity by charitable organizations prior to 1934 make it difficult to interpret the congressional intent behind the 1934 amendment with total confidence. "In view of the existing case law on the subject, it is not clear what the proponents of the legislation sought to accomplish." Clark, *The Limitation on Political Activities: A Discordant Note in the Law of Charities*, 46 VA. L. REV. 439, 447 (1960). The addition to the statute may have been meant simply to codify preexisting regulation of charitable organizations. To a

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[37] *See, e.g., Herbert E. Fales*, 9 B.T.A. 828 (1927) (evidence indicated that Scientific Temperance Federation, Massachusetts Anti-Saloon League, Massachusetts Anti-Cigarette League, and International Reform Bureau were formed to disseminate controversial propaganda); *Sophia G. Coxe*, 5 B.T.A. 261 (1926) (League to Enforce Peace not exclusively charitable). *See generally Jackson v. Phillips*, 96 Mass. (14 Allen) 539 (1867) (trust to promote "women's rights" not charitable); *Bowditch v. Attorney General*, 241 Mass. 168, 134 N.E. 796 (1922) (trust for promotion of temperance held charitable). The later case of *Slee v. Commissioner*, 42 F.2d 184 (2d Cir. 1930), was widely followed. *E.g., James J. Forstall*, 29 B.T.A. 428, 436 (1933); *Leubuscher v. Commissioner*, 54 F.2d 998, 1000 (2d Cir. 1932); *Weyl v. Commissioner*, 48 F.2d 811, 812 (2d Cir. 1931).

great extent, however, commentators hold the view that the 1934 enactment was a reform measure intended to liberalize the case law.[38] It appears that the proponents wanted to restrict selfishly motivated political agitation, meant to secure some personal interests of the donor, without providing that all political activity by charitable organizations was inherently improper. The breadth of the lobbying restriction has therefore been attributed primarily to the inability of Congress to draft a more "appropriate" test.[39] This theory finds support in the debates. Senator Reed, who was also a member of the Senate Finance Committee, observed on the floor that "we found great difficulty in phrasing the amendment. I do not reproach the draftsmen. I think we gave them an impossible task; but this amendment goes much further than the committee intended to go." 78 CONG. REC. 5861 (1934).

Whatever the strength of these views, they strongly suggest that the 1934 amendment applying only to charitable organizations cannot automatically be presumed to show that Congress addressed only "the phase of the problem which seem[ed] most acute to the legislative mind." *Williamson v. Lee Optical Co.*, 348 U.S. 483, 489

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[38] *See, e.g., Seasongood v. Commissioner*, 227 F.2d 907, 910 (6th Cir. 1955) (courts "have also applied the principle, that the section being remedial must be liberally construed"); Clark, *supra* note 12, at 447; Borod, *supra* note 22, at 1113 (1934 amendments "were intended to some extent to liberalize, rather than restrict, the administration of the revenue laws in regard to charitable organizations"); Caplin & Timbie, *supra* note 6, at 185 ("A persuasive case can be made" that "Congress intended a more limited proscription than a literal reading of the statute would suggest"). The restriction has been widely excoriated. *E.g.*, Note, *The Tax Code's Differential Treatment of Lobbying Under Section 501(c)(3)*, 66 VA. L. REV. 1513, 1525 (1980); Note, *Political Activity and Tax Exempt Organizations Before and After the Tax Reform Act of 1969*, 38 GEO. WASH. L. REV. 1114, 1136 (1970) (restriction is "obscure in origin, uncertain in application, and perhaps harmfully outmoded").

[39] Garrett, *supra* note 29, at 564; *see* Clark, *supra* note 12, at 447.

(1955). If the 1934 amendment was intended to liberalize the case law, the fact that it applied only to charitable organizations would suggest that Congress meant to treat lobbying by such groups *less* stringently than similar activity by other groups.[40] The legislative history provides no positive assurance for this proposition, of course, but it also fails utterly to demonstrate that Congress restricted the lobbying of charitable organizations because of special problems arising in that area alone.

B. *Substantiality of the State Interests*

If there are any other governmental interests furthered by disparate tax treatment of lobbying activities by tax-exempt organizations and other groups, they have not been identified in the legislative history or by the parties in this case. The question now becomes whether any of these interests are sufficiently substantial to justify the differential tax treatment, and if so whether the statute is narrowly tailored to meet them.

The preceding discussion clearly identified governmental interests that justify allowing businesses to deduct the cost of business lobbying. Because the government assesses taxes on net business income, such deductions are necessary in order to permit accurate measurement of the cost of producing goods and services. In contrast, tax-exempt organizations have no comparable need for a realistic reflection of income. The governmental interest in distinguishing between these two kinds of organizations is a substantial one, and the Code's differentiation between businesses and Section 501(c)(3) organizations is both

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[40] Some additional support for this argument may lie in the enactment of Section 501(h) in 1976, *see* note 6 *supra*, which liberalized the rules governing lobbying by charitable organizations by freeing them from the uncertain application of the "substantiality" test. *See Hearings on Legislative Activity by Certain Types of Exempt Organizations Before the House Comm. on Ways and Means*, 92d Cong., 2d Sess. 1 (1972); Geske, *Direct Lobbying Activities of Public Charities*, 26 TAX LAWYER 305 (1972).

relevant to that interest and narrowly tailored to serve it.[41]

The addition of Section 162(e) has import in assessing the strength of the government's analysis in this case, however, because it demonstrates that lobbying is not an inherently improper activity concerning which Congress seeks as much neutrality as possible. Section 162(e) unquestionably demonstrates a decision by Congress to depart from the posture of neutrality toward lobbying that once was affirmed by *Cammarano*.[42] It therefore un-

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[41] The same reasoning supports the deductibility of contributions to unions and business leagues under Sections 501(c)(5) and 501(c)(6). As noted above, such contributions are deductible only to the extent they are "business expenses" under Section 162. *See* note 9 *supra*.

It may be noted in passing, however, that some of the governmental concerns articulated in the reports accompanying the enactment of Section 162(e) are of doubtful constitutional validity. Neither the importance of some legislation to a business' existence nor the desirability of encouraging business people to bring relevant information to the attention of Congress offers a clear and substantial justification for subsidizing lobbying by particular groups over others. *See* S. REP. No. 1881 at 22-23, [1962] U.S. CODE CONG. & AD. NEWS at 3325.

[42] *See, e.g.*, Garrett, *supra* note 29, at 583 ("By reversing the Supreme Court, the 1962 amendment to section 162(e) indicates a changed congressional position on subvention, makes defense of the policy difficult since it is no longer uniformly applied, and raises serious first amendment issues regarding whether the restrictions applied to section 501(c)(3) and 170(c)(2) organizations operate discriminatorily to suppress constitutional freedoms"); *Influencing Legislation by Public Charities: Hearings Before the House Comm. on Ways and Means*, 94th Cong., 2d Sess. 68 (1974) (ABA statement):

> [N]ow that direct business lobbying has become a deductible activity under § 162(e), the former "neutral posture of the tax law with respect to lobbying" (see Cammarano v. United States, *supra*) has been upset in favor of the business interests as opposed to the charitable organizations.

The reports accompanying section 162(e) also suggest that federal policy is not neutral, but is one of encouraging business participa-

dercuts any suggestion that because efforts to influence legislation present "well-recognized dangers to representative Government," *Haswell v. United States*, 500 F.2d at 1150, such efforts should never be subsidized through tax deductions.[43] The first of the three governmental interests given by the district court for the restriction on lobbying by charitable organizations—the preservation of governmental neutrality concerning lobbying—therefore disappears.

The second such interest, prevention of abuse of charitable lobbying by private interests, also fails to pass constitutional muster under a close scrutiny test. There is no evidence whatsoever that the lobbying of veterans is less subject to abuse by private interests than that of other Section 501(c) groups. Thus, although this interest is doubtless valid, it cannot be suggested that Section 501(c) has been tailored to meet it. We decline the government's invitation to infer that because Congress did not apply the lobbying exemption to all exempt organizations, it saw no problem in according special tax benefits to veterans' organizations despite their lobbying activities. The legislative history discussed above provides no support for such an inference.

The final interest said to require special treatment of lobbying by charitable organizations—"preservation of a

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tion in the legislative process. S. REP. No. 1881 at 23, [1962] U.S. CODE CONG. & AD. NEWS at 3325.

[43] The Supreme Court has recognized that departures from uniform pursuit of an asserted governmental purpose raise doubts as to whether that purpose is genuinely important. *See, e.g., Metromedia, Inc. v. San Diego*, —— U.S. ——, ——, 49 U.S.L.W. 4925, 4933 (1981) ("exceptions to the general prohibition are of great significance in assessing the strength of the city's interest"); *Schad v. Borough of Mount Ephraim*, —— U.S. at ——, 49 U.S.L.W. at 4600 n.14 ("The Borough's decision to permit live entertainment as a nonconforming use only undermines the Borough's contention that live entertainment poses inherent problems that justify its exclusion").

balance between the lobbying activities of charitable organizations" and those of other groups—also fails to meet the heightened standard applicable here. There is absolutely no evidence that Congres sought to achieve this objective when it enacted the lobbying restriction in 1934. Even if charities before that time could lobby with deductible contributions, there is no indication that charities had become so powerful that they threatened to drown out the voiecs of those whose lobbying was not similarly subsidized.[44] Moreover, had this been the intent of Congress, courts would consider such a purpose constitutionally illegitimate. "[W]here, as here, the legislature's suppression of speech suggests an attempt to give one side of a debatable public question an advantage in expressing its views to the people, the First Amendment is plainly offended." *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 785-86 (1978); *see id.* at 790-91. "[T]he concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment." *Buckley v. Valeo*, 424 U.S. at 48-49. The governmental purposes said to require special restrictions on lobbying by Section 501(c)(3) organizations are

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[44] Members of this court have suggested that in First Amendment cases, judges should consider only the actual governmental purposes behind challenged legislation rather than possible or hypothetical ones. *See, e.g., Community-Service Broadcasting of Mid-America, Inc. v. FCC*, 593 F.2d at 1128 (Robinson, J., concurring in part) ("courts cannot rely upon aims that apparently never crossed the minds of the legislators, particularly when confronted by the possibility of danger to a fundamental interest") (footnote omitted); *id.* at 1146 & n.51 (Leventhal, J., concurring) ("Courts engaged in the careful scrutiny of legislation . . . are not free to conjecture an important governmental interest when one has not surfaced in congressional deliberations.") *Cf. Califano v. Goldfarb*, 430 U.S. 199, 212-17 (1977) (plurality opinion) (examining legislative history of challenged statute to determine "actual purpose" of discrimination, and refusing to accept objectives advanced by appellants because Congress had given no attention to them).

therefore either illegitimate, insubstantial, or inadequately promoted by a statute that is not narrowly tailored to serve them.

Moreover, the Code's discriminatory treatment of lobbying by veterans' organizations does not even satisfy the test of rationality, much less the heightened level of scrutiny appropriate here. The legislative history of the tax exemptions accorded veterans demonstrates absolutely no governmental interest whatsoever that is served by allowing such groups to conduct substantial lobbying with tax-deductible contributions. The post hoc rationales suggested by the government are constitutionally illegitimate. Allowing veterans to lobby freely in order to protect their benefit programs does not explain why other groups that may be equally dependent upon Congress for support should have less access to the legislature. Other tax-exempt groups, such as universities, are equally beset by hostile forces but are nevertheless limited by Section 501 (c)(3) in the amount of lobbying they may do to maintain or increase their level of congressional funding. Finally, it emphatically does not follow that because veterans deserve special benefits in recognition of their service to the country, they are entitled to greater First Amendment rights than other citizens. The First Amendment proscribes governmental efforts to favor one speaker over another. *See, e.g., Carey v. Brown*, 447 U.S. at 462-63; *First National Bank of Boston v. Bellotti*, 435 U.S. at 784-85; *Police Dep't v. Mosley*, 408 U.S. at 96. "First Amendment rights may not be used as a type of 'currency' to reward those who have rendered service to the nation or who are otherwise determined to be worthy." Taxation Supp. Brief at 19.

In short, the Code's classification according tax benefits to lobbying by some tax-exempt groups but not others does not withstand constitutional scrutiny. No identifiable governmental interests justify the differential tax treatment of lobbying by veterans' groups and Section

501(c)(3) organizations. The distinctions and interests suggested by the government are either completely unrelated to any substantial purpose, or reflect only illegitimate governmental goals. "[I]t has been open to courts since the enactment of the Fourteenth Amendment to determine, if on the particular facts they must, that a discriminaion reflects *no* policy, but simply arbitrary and capricious action." *Baker v. Carr*, 369 U.S. 186, 226 (1962) (emphasis by the Court).

C. *The Unconstitutionality of These Classifications*

Because no substantial purpose justifies the disparate treatment of lobbying by Section 501(c) when that statute is subjected to careful scrutiny, the discriminatory treatment of Taxation's First Amendment activities constitutes a denial of equal protection, and is unconstitutional. Even so, this remains a troublesome case. Congress has enormous leeway in classifying the recipients of its benefits and funds, and in favoring certain groups over others.[45] If Congress provided office space and government surplus furniture to veterans' organizations, for example, as Congress clearly has authority to do, it would indirectly facilitate the lobbying of such groups by freeing up funds that other organizations such as Taxation would have to spend for rent and supplies. Moreover, Congress occasionally appropriates grants for certain groups with the understanding that the money may be used for public education, litigation, and lobbying.[46]

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[45] Article I, Section 8 of the Constitution empowers Congress to lay and collect taxes and expend public funds for the general welfare. Its powers under this clause are broad. *See Steward Machine Co. v. Davis*, 301 U.S. 548 (1937).

[46] *See, e.g.*, 42 U.S.C. § 2996f(a)(5) (1980) (Legal Services Corporation prohibited to use funds to influence passage or defeat of federal or state legislation except in delineated circumstances); 42 U.S.C. § 5653 (1980) (National Institute for Juvenile Justice and

Similarly, in other contexts such as National Public Radio and Television, the government directly funds First Amendment activity that by necessity excludes some speakers and favors others. *See* Emerson, *The Affirmative Side of the First Amendment*, 15 GA. L. REV. 795, 823-28 (1981); Note, *Freeing Public Broadcasting from Unconstitutional Restraints*, 89 YALE L.J. 719 (1980) (arguing that direct state subsidy of the Public Broadcasting Service violates the First Amendment).

We suggest nothing concerning the constitutionality of any of these grants and programs, which of course are not before us. Nevertheles, it may be observed that certain principles do distinguish many of these programs from the lobbying preference now given to veterans. First, it is well established that although government may not directly facilitate the speech of one person over that of another, government too is a rightful participant in the "marketplace of ideas."[47] Examples such as the

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Delinquency Prevention authorized to prepare studies and recommendations and disseminate information to individuals, agencies, and organizations concerned with prevention and treatment of juvenile delinquency).

[47] *See, e.g., Greer v. Spock*, 424 U.S. 828, 838 n.10 (1976); *Toward a Gayer Bicentennial Committee v. Rhode Island Bicentennial Foundation*, 417 F. Supp. 632, 638-39 & n.9 (D.R.I. 1976) (state can inquire whether applicants proposed use of public area comports with theme specified by government). The government also possesses editorial powers when it acts as the proprietor of an entity with press rights. *See Avins v. Rutgers, State Univ. of New Jersey*, 385 F.2d 151 (3d Cir. 1967), *cert. denied*, 390 U.S. 920 (1968) (state university law review had editorial prerogative of rejecting article). It may be difficult, of course, to distinguish between government-sponsored speech and private speech in close cases. *Compare Bonner-Lyons v. School Committee*, 480 F.2d 442 (1st Cir. 1973) *with Buckel v. Prentice*, 572 F.2d 141 (6th Cir. 1978). *See generally Perry Local Educators' Ass'n. v. Hohlt*, 652 F.2d 1286, 1292-96 (7th Cir. 1981); Emerson, *supra* note 23, at 831, 837; Shiffrin, *Government Speech*, 27 U.C.L.A. L. REV. 565, 577-88 (1980); Yudof, *When Governments Speak: Toward a Theory of Government Expression and the First Amendment*, 57 TEX. L. REV. 863, 908-12 (1979).

Voice of America and the press offices of executive departments and agencies illustrate the government's authority to communicate with its citizens and the people of the world. Under some conditions, it is possible that the government could also subsidize private groups or speakers in an effort to get its own message across. *Compare Community-Service Broadcasting of Mid-America, Inc. v. FCC*, 593 F.2d at 1110 n.17, *with* Shiffrin, *Government Speech*, 27 U.C.L.A. L.REV. 565 (1980). Second, the very nature of government may dictate that it alone can provide certain forums for First Amendment expression, from parks with rostrums to a national public television system. First Amendment principles apply to these forums, of course, but they require that access be nondiscriminatory [48] rather than that government not

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[48] *See, e.g., Police Department v. Mosley*, 408 U.S. 92 (1972); *Healy v. James*, 408 U.S. 169 (1972); *Cox v. Louisiana*, 379 U.S. 536 (1965); *Hague v. CIO*, 307 U.S. 496 (1939). Similar principles govern the time, place, and manner restraints that may be applied to First Amendment expression without violating the Constitution. *See, e.g., Grayned v. City of Rockford*, 408 U.S. 104, 116 (1972) ("The crucial question is whether the manner of expression is basically incompatible with the normal activity of a particular place at a particular time"); *Kovacs v. Cooper*, 336 U.S. 77 (1949) (loudspeakers); *Cox v. New Hampshire*, 312 U.S. 569 (1941) (parades).

In certain situations, the fact that government has created the forum seems to permit some discrimination among speakers that is directed toward content but neutral with regard to viewpoint. *See, e.g., FCC v. Pacifica Foundation*, 438 U.S. 726 (1978) (FCC can regulate use of certain words on airwaves); *Lehman v. City of Shaker Heights*, 418 U.S. 298 (1974) (plurality opinion) (municipal bus system can permit commercial but not political advertising). *Compare Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546 (1975) (granting claim for access to municipal theatre by promotor of controversial production) *with Young v. American Mini Theatres, Inc.*, 427 U.S. 50 (1976) (plurality opinion) (upholding restrictive zoning ordinance for theatres exhibiting sexually explicit films). *See generally* Karst, *Public Enterprise and the Public Forum*, 37 OHIO ST. L.J. 247 (1976); Comment, *Access to State-Owned Communications Media—the Public*

create the facilities at all. Finally, it is possible that a thorough constitutional analysis of certain programs might well demonstrate that although the government program *does* discriminatorily subsidize certain speakers, the state interest is sufficiently compelling that the discrimination is not unconstitutional. Until other programs that arguably subsidize First Amendment rights in a discriminatory fashion come before us, however, it would be injudicious to undertake any elaborate constitutional analysis of what might now seem analogous situations.

What does remain crucially important, however, is that none of these possible justifications can uphold discriminatory tax treatment of lobbying by different kinds of Section 501(c) organizations. There is a brightline distinction between direct legislative promotion of speech, and indirectly facilitating speech by providing an organization with other kinds of support. It cannot conceivably be argued that the lobbying preference for veterans' organizations demonstrates the government's attempt to get its own message across to the public, because the Code provides open-ended subsidization of any position that these groups choose to espouse even if those positions directly challenge the policy of the government.[49] With-

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Forum Doctrine, 26 U.C.L.A. L.REV. 1410 (1979); Note, *The Public Forum: Minimum Access, Equal Access, and the First Amendment*, 28 STAN. L.REV. 117 (1975). Other standards may be appropriate where the "forum" is not public at all. *See United States Postal Service v. Council of Greenburgh Civic Ass'ns.* —— U.S. ——, 49 U.S.L.W. 4813 (1981) (upholding statute prohibiting deposit of unstamped "mailable" matter in officially approved mailboxes).

[49] As noted earlier, *see* note 11 *supra*, veterans' organizations have not restricted their lobbying to issues of particular importance to veterans, such as veterans' benefit programs. A particularly notable example is the lobbying of many veterans' organizations against the proposed Panama Canal treaties. *See, e.g., Panama Canal Treaties: Hearings Before the Senate Comm. on Foreign*

out passing judgment on the constitutionality of congressional attempts to advance the message of Congress itself by funding the speech of particular groups, it is clear that Congress cannot write favored organizations a blank check payable on the First Amendment.

IV. The Constitutional Remedy

Section 501(c)'s disparate treatment of lobbying by particular tax-exempt groups leads to an unconstitutional violation of equal protection principles. The final question before us is the appropriate relief. The most obvious remedy—striking down the Section 501(c)(3) lobbying limitation that now governs Taxation—poses the most obvious problems. The legislative history of that limitation clearly shows a congressional determination that the public interest requires regulating the amount of tax-deductible dollars flowing to Section 501(c)(3) organizations that may be used for lobbying purposes. Extending the lobbying treatment now given to veterans' organizations to all Section 501(c)(3) groups might open a Pandora's Box of woes and abuse. The government notes, for example, that during the 1980 fiscal year, there were 319,842 organizations listed as exempt under Sec-

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Relations, 95th Cong., 1st Sess. 566 (1977) (statement of Robert Charles Smith, National Commander, American Legion); *id.* at 578 (statement of Frank D. Ruggiero, National Commander, Amvets); *id.* at 582 (statement of Maj. Gen. J. Milnor Roberts, U.S. Army Reserve, executive director, Reserve Officers Ass'n.); *id.* at 595 (statement of Col. Phelps Jones, USA-Ret., director national security and foreign affairs, VFW); *Proposed Panama Canal Treaties, Hearings Before the House Comm. on International Relations*, 95th Cong., 1st & 2d Sess. 155 (1977-1978) (statement of Dr. John Wasylik, National Commander in Chief, VFW); *id.* at 163 (statement of William J. Rogers, immediate past national commander, American Legion); *id.* at 171 (statement of Frank D. Ruggiero, National Commander, Amvets); *id.* at 175 (statement of Dr. Robert P. Foster, chairman national foreign relations commission, American Legion); *id.* at 177 (statement of Col. Phelps Jones, director national security and foreign affairs, VFW).

tion 501(c)(3), but only 22,247 veterans' groups.[50] In 1978, contributions, grants, and gifts to Section 501(c)(3) organizations aggregated more than $21.9 billion, nearly 1500 times the $16.7 million given to veterans' organizations.[51] If we permitted Section 501(c)(3) groups to lobby as freely as veterans' organizations, there would be a clear risk of abuse by private interests and an increase in the amount of "selfish" contributions "made to advance the personal interests of the giver of the money." 78 CONG. REC. 5861 (Senator Reed). Even when they attempt to remedy constitutional violations, courts must resist ordering relief that clearly exceeds the legitimate expectations of Congress.[52]

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[50] IRS Supp. Brief at 40 (citing IRS Exempt Organizations Master File, 1980 IRS ANN. REP. 76). The government cautions that this does not represent a true universe of Section 501(c)(3) organizations, however, because certain organizations such as churches need not apply for recognition unless they desire a ruling, and because the ruling letter covers not only the applying organization but all of its subordinate units.

[51] *Id.* (based on 90 percent of all information returns filed by such organizations for the 1978 taxable year).

[52] Taxation also implies the existence of a considerably narrower remedy. It claims that the most repugnant feature of the current lobbying limitation in Section 501(c)(3) is that organizations that engage in "substantial lobbying" lose their right to receive *any* tax-deductible contributions and not just those contributions used specifically for lobbying. In his concurring opinion in *Cammarano v. United States*, for example, Justice Douglas suggested that the statute in question would have been found invalid had it denied *all* deductions to an organization that spent money to promote or oppose an initiative, rather than simply denying deductions of the money spent in that effort. 358 U.S. at 515. Taxation therefore suggests that an analogous remedy in this case would be to deny tax-deductibility only in an amount proportionate to the amount of lobbying in which a Section 501(c)(3) organization engaged. *Cf. Harris v. McRae*, 448 U.S. 297, 317 n.19 (1980), which held that a "broad disqualification from receipt of public benefits" may be unconstitutional even when a more limited exclusion is permissible. In that case, the Court held that although Congress might decline to subsidize certain

A second remedy is also possible in this case. As the Supreme Court has recognized, in certain situations benefits may be taken away from a preferred group in order to cure unconstitutionally unequal treatment, even if that group is not before the court. *See, e.g., Welsh v. United States*, 398 U.S. 333, 361-65 (1970) (Harlan, J., concurring in result); *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 543 (1942). "The right invoked is that to equal treatment; and such treatment will be attained if either their competitors' taxes are increased or their own reduced." *Iowa-Des Moines National Bank v. Bennett*, 284 U.S. 239, 247 (1931). *Cf. Kirk v. Commissioner*, 425 F.2d 492, 495 (D.C. Cir.), *cert. denied*, 400 U.S. 853 (1970) (refusing to reach constitutionality of

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medically necessary abortions, a "substantial constitutional question would arise if Congress had attempted to withhold all Medicaid benefits from an otherwise eligible candidate simply because that candidate had exercised her constitutionally protected freedom to terminate her pregnancy by abortion." *Id.* Taxation argues that precisely the same disproportionate penalty is imposed by Section 501(c)(3) when an organization exercises First Amendment rights fully, and urges that the Constitution requires at the very least that its contributors' deductions be limited only to the extent of the amounts actually spent on lobbying by a Section 501(c)(3) organization.

Taxation's argument is not without merit but we decline to grant the alternative remedy for the same reason discussed above. Each of the several hundred thousand Section 501(c)(3) organizations now monitored by the IRS may have hundreds of thousands of separate contributors. For each organization, the IRS would have to ascertain the proportion of lobbying activities to other expenses of the organization, and then trace that percentage through to the individual contributions in order to limit the amount of their deductibility to the same proportion. In a less complex world, this logical scheme might be appropriate, although it would not cure the equal protection violation found here. But this remedy could easily overload and destroy any IRS capacity for monitoring these organizations and become an administrative nightmare subject to widespread disregard or abuse. Although mandating such a remedy is within the authority of Congress, this court should not impose a massive new work-load on the IRS that leads to so partial a cure of the discrimination shown here.

income exclusion for ministers because even if the statute violated the Establishment Clause, "it would not affect the tax liability in this case. Rather ministers of the gospel would then no longer be entitled to the benefits of the exclusion."). Although a number of cases involving equal protection challenges to underinclusive federal benefit statutes suggest that "extension, rather than nullification, is the proper course," *Califano v. Westcott*, 443 U.S. 76, 89 (1979), "[i]n choosing between these alternatives, a court should attempt to accommodate as fully as possible the policies and judgments expressed in the statutory scheme as a whole." *Id.* at 94 (Powell, J., dissenting). It seems evident that the legislative judgments expressed in Section 501(c) will be less disturbed by striking down the preferential treatment now accorded the lobbying of veterans' organizations than by extending that treatment to Section 501(c)(3) organizations. The legislative history, suggesting that the current treatment of veterans may have been inadvertent but demonstrating a clear congressional concern to prevent abuse of charitable lobbying by private interests, fully confirms this view.

This remedy appears the most logical and most in accordance with the judgments expressed by Congress. But the veterans' organizations that would be directly affected by nullification of preferential treatment in Section 501(c) have not heretofore been parties to this litigation. Courts must always be cautious when dealing with the interests of those who have not had an opportunity to present their own arguments and defenses, partly because judicial legitimacy stems in large measure from hearing the views of all those who are directly involved. *See* Fiss, *The Supreme Court, 1978 Term—Foreword: The Forms of Justice*, 93 HARV. L. REV. 1, 44-46 (1979). It is less significant, though still noteworthy, that Taxation also opposes this solution to the unconstitu-

tionality of Section 501(c).[53] We therefore decline to adopt this remedy at this time.

Accordingly, this case is remanded to the district court with the instruction that it cure the constitutionally invalid operation of Section 501(c) after inviting veterans' organizations to participate in framing the relief. In the interim, of course, the IRS may seek other remedies. It may decide that additional regulations governing lobbying by veterans' organizations—and mose diligent enforcement of the lobbying regulations that already govern those organizations—are in fact in accordance with the congressional purpose behind Section 501(c).[54] The IRS and veterans' groups might also seek from Congress a clearer determination of the purposes, if any, that Congress had in mind when it enacted legislation giving preferential tax treatment to lobbying by veterans, or passage of more narrow legislation that could show that veterans' groups actually speak for Congress in advocating specific kinds of veterans' programs and benefits. On the record before us, however, it is not even clear that Section 501(c)'s unequal application reflects any congressional intent whatsoever. The broad tax support provided to veterans' organizations for lobbying on any side of any issue they choose, and the companion restriction on lobbying by charitable groups and other Section 501(c)(3) organizations, creates an unconstitutional disparity. Exactly how this problem should be cured is not

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[53] Taxation Supp. Brief at 20 n.4. In *Iowa-Des Moines Bank v. Bennett*, 284 U.S. at 247, the Court ordered a refund of "the excess of taxes exacted" from appellants because "it is well settled that a taxpayer who has been subjected to discriminatory taxation through the favoring of others in violation of federal law, cannot be required himself to assume the burden of seeking an increase of the taxes which the others should have paid."

[54] The IRS presumably came to analogous conclusions concerning the treatment of lobbying by fraternal beneficiary societies, despite the apparent silence of the Code on that question. *See* pp. 10-11 *supra*.

a matter that should be decided initially by this appellate court, especially when all directly affected parties are not before us.

CONCLUSION

The First Amendment occupies a preferred place in out scheme of government. *Thomas v. Collins*, 323 U.S. 516, 530 (1945). This does not mean, however, that its application in a legal dispute is always simple. The lines will seem clearer when Congress directly prohibits a particular group from speaking in a particular place, and more confused when Congress subsidizes First Amendment expression unevenly through the intricacies of the Internal Revenue Code. Nevertheless, the principle remains the same. Bcause the Code differentiates in its treatment of protected First Amendment activity by various tax-exempt organizations, the constitutionality of its classifications must be judged by a heightened level of scrutiny.

When viewed in that light, there can be no question that the suggested distinctions between Taxation and preferred tax-exempt organizations are constitutionally meaningless. Discrimination in government subsidization of First Amendment rights must be narrowly tailored to meet a substantial state purpose, and the proffered distinctions between the favored groups and Section 501(c)(3) organizations are either unrelated to any governmental interest whatsoever or are illegitimate bases for governmental classification. Indeed, although it has not been necessary to reach the question, it is possible that these discriminations could not even be upheld under a test asking whether they were "rationally related to a legitimate governmental purpose," for the discrimination may have been nothing more than an accidental or inadvertent result of legislative drafting.

Tax discrimination against the lobbying of Taxation and similar tax-exempt organizations therefore fails to meet the constitutional standard appropriate here. We

reverse and remand this case with instructions that the unequal treatment be cured, either by restricting the tax benefits accorded veterans' organizations or by extending those benefits to Section 501(c)(3) organizations. Even in the arcane intricacies of the tax code, the government cannot give special voice nor lend special ear to any person or group no matter how worthy their ideas or their credentials. The exacting standards of the First Amendment do not allow the government to provide a preferred place for certain parties—at least not without a more substantial state purpose than has been shown here.

Reversed and remanded

MACKINNON, *Circuit Judge* (dissenting). Appellant Taxation with Representation of Washington (Taxation) is incorporated as a nonprofit charitable and educational organization whose purpose is to represent the general public on tax issues before Congress, the courts, and the executive branch. After its incorporation in June 1977, Taxation applied to the Internal Revenue Service (IRS) for a declaration that it was an organization described in § 501(c)(3) of the Internal Revenue Code (Code), 26 U.S.C. § 501(c)(3). Although Taxation may otherwise have qualified for section 501(c)(3) status,[1] the IRS determined that Taxation intended to devote a substantial part of its activities to "attempt[s] to influence legislation" by lobbying Congress on matters involving the federal tax system. The effect of that determination, the correctness of which Taxation does not contest, was to deprive it of several tax advantages, including exemp-

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[1] Section 501(c)(3) applies to:

> Corporations, and any community chest, fund, or foundation, organized and operated exclusively for religious, *charitable*, scientific, testing for public safety, literary, or *educational* purposes . . . no part of the net earnings of which inures to the benefit of any private shareholder or individual, *no substantial part of the activities of which is carrying on propaganda, or otherwise attempting, to influence legislation* (except as otherwise provided in subsection (h)), and which does not participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of any candidate for public office.

(emphasis added). Such organizations are exempt from taxation under the income tax subtitle unless such exemption is denied under I.R.C. §§ 502, 503, or 504, sections with which we are not concerned in this appeal. Wholly apart from the issues raised by the lobbying restriction, it could be seriously questioned how an organization the avowed purpose of which is the lobbying of Congress has a 'religious, charitable, scientific, testing for public safety, literary or educational purpose' that brings it within § 501(c)(3) in the first instance.

tion from certain taxes on its own activities[2] and the eligibility to receive tax deductible contributions.[3] (These

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[2] Tax benefits accruing to a § 501(c)(3) organization include: exemption from income tax by virtue of § 501(a); exemption from § 3111(a)'s federal social security (FICA) taxes by virtue of § 3121(a), (b)(8)(B); and exemption from § 3301's federal unemployment (FUTA) taxes by virtue of § 3306(b), (c)(8).

[3] I.R.C. § 170 provides for the deduction of contributions from income tax:

> (a) *Allowance of deduction.*—
>
> (1) General rule.—There shall be allowed as a deduction any charitable contribution (as defined in subsection (c)) payment of which is made within the taxable year. . . .
>
> (c) *Charitable contribution defined.*—For purposes of this section, the term "charitable contribution" means a contribution or gift to or for the use of—
>
> . . . .
>
> (2) A corporation, trust, or community chest, fund, or foundation—
>
> (A) created or organized in the United States or any possession thereof, or under the law of the United States, any State, the District of Columbia, or any possession of the United States;
>
> (B) organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes, or to foster national or international amateur sports competition (but only if no part of its activities involve the provision of athletic facilities or equipment), or for the prevention of cruelty to children or animals;
>
> (C) no part of the net earnings of which inures to the benefit of any private shareholder or individual; and
>
> (D) *Which is not disqualified for tax exemption under section 501(c)(3) by reason of attempting to influence legislation*, and which does not participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of any candidate for public office. [Emphasis added.]

Similar language permits donors to make analogous deductions with respect to the gift tax, I.R.C. § 2522(a)(2) (citizens or resi-

advantages are referred to collectively herein as the "tax benefits" accruing to organizations qualifying under section 501(c)(3).) Taxation may still qualify for tax exemption on its own income as a social welfare organization under I.R.C. section 501(c)(4).[4] That subsection, however, while placing no restrictions on an organization's lobbying activities, does not result in donors being permitted to *deduct contributions* from their own income, gift and estate taxes.[5]

After exhausting its administrative remedies, Taxation brought a declaratory judgment action against the Com-

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dents) & (b)(2) (nonresident aliens), and the estate tax, I.R.C. §§ 2055(a)(3) (citizens or residents) & 2106(a)(A)(ii) (nonresident aliens).

In addition, foundations may be deterred from contributing to an organization that fails the lobbying test for section 501(c)(3) status because otherwise untaxed foundations and their managers are subject to tax if the foundation pays any amount "to carry on propaganda, or otherwise to attempt, to influence legislation." I.R.C. § 4945(a), (d)(1).

[4] Section 501(c) applies to:

> Civic leagues or organizations not organized for profit but operated exclusively for the promotion of social welfare, or local associations of employees, the membership of which is limited to the employees of a designated person or persons in a particular municipality, and the net earnings of which are devoted exclusively to charitable, educational, or recreational purposes.

Taxation is the product of a merger between two organizations, one (Taxation with Representation Fund) a § 501(c)(3) group devoted to courtroom advocacy, and the other (Taxation with Representation) at § 501(c)(4) group devoted to legislative advocacy. *See* J.A. at 16.

[5] Taxation could also seek to qualify under I.R.C. § 501(h), which permits some § 501(c)(3) organizations to devote specified quantities of their exempt purpose expenditures to lobbying, rather than adhere to the less certain "substantiality" test of § 501(c)(3). In the district court, however, Taxation expressly disavowed any intention to make an election under § 501(h). J.A. at 15-16. *See* discussion at 22-24 *infra*.

missioner of Internal Revenue under 26 U.S.C. § 7428 (1976),[6] seeking a declaration that section 501(c)(3)'s restriction of substantial attempts to influence legislation is unconstitutional. The district court granted the Commissioners' motion for summary judgment, *Taxation with Representation of Washington v. Blumenthal*, 43 A.F.T.R. 2d (P-H) ¶ 79-419 (1979), and on appeal, a divided panel of this court affirmed. *Taxation with Representation v. Blumenthal*, No. 79-1464 (D.C. Cir. April 14, 1981). On June 11, 1981, this court voted to hear the case *en banc*, which under our rules vacates the panel opinions. The court's order stated that the hearing *en banc* would focus upon two issues: (1) the standard of review applicable to the challenged statutory scheme, and (2) the ultimate constitutionality of the Code's distinction between fraternal and veterans' organizations on the one hand and section 501(c)(3) exempt organizations on the other.[7]

I.

A case raising the same issue presented here was decided against one of Taxation's predecessor organizations[8] by the Fourth Circuit in *Taxation with Representation v. United States*, 585 F.2d 1219 (4th Cir. 1978), *cert. denied*, 441 U.S. 905 (1979). The district court in this case followed that decision in disposing of Taxation's contentions. 43 A.F.T.R.2d (P-H) ¶ 79-419 at 79-681. For the reasons set forth in the margin, I

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[6] Section 7428 authorizes certain courts to issue declaratory judgments in certain cases relating to the status and classification of organizations under 26 U.S.C. § 501(c)(3).

[7] Taxation also originally challenged the validity of permitting businesses to deduct their lobbying expenses as "ordinary & necessary" business expenses. *See* I.R.C. § 162(e). That contention was not pursued before the court *en banc*, and we do not reach its merits here.

[8] *See* not 4 *supra*.

find the present suit not barred by the doctrine of res judicata, and therefore address the merits.[9]

[9] Taxation's papers in the district court made clear that it absorbed the functions of the taxpayer organization that lost in *Taxation with Representation*. *See* J.A. at 16-18. The record before the district court also establishes that Taxation has the same chief executive as had Taxation with Representation, the appellant in the Fourth Circuit case, *compare id.* at 14 *with id.* at 16, and employs the same attorney, *compare id.* at 6 *with* 585 F.2d at 1220. Despite this close relationship between issues and parties, the Government has not pleaded or argued that Taxation should be precluded, as a matter of res judicata or collateral estoppel, from litigating the issues the Fourth Circuit decided against Taxation with Representation.

Although collateral estoppel and res judicata are waivable affirmative defenses under Fed. R. Civ. P. 8(c), some courts have addressed the preclusion issue *sua sponte* where information within their notice has effectively relieved the defendant of his usual burden of proof on the issue. *E.g.*, Boone v. Kurtz, 617 F.2d 435, 436 (5th Cir. 1980) ("[E]ven though Fed. R. Civ. P. 8(c) denominates res judicata as an affirmative defense[,] [d]ismissal by the court *sua sponte* on *res judicata* grounds . . . is permissible in the interest of judicial economy where both actions were brought before the same court"); Gullo v. Veterans Coop. Housing Ass'n, 269 F.2d 517, 517 (D.C. Cir. 1959) (trial court may apply res judicata upon taking notice of parties' previous case); Wilson v. United States, 166 F.2d 527, 528-29 (8th Cir. 1948) (appellate court on own motion may determine action is barred by res judicata); Holmes v. United States, 231 F. Supp. 971, 972-73 (N.D. Ga. 1964), *aff'd*, 353 F.2d 785 (5th Cir. 1965) (court, apparently on own motion, took judicial notice of prior proceedings and applies res judicata on defendants' motion for summary judgment). *Accord*, *cases cited in* United States v. Sioux Nation, 448 U.S. 371, 432 (1980) (Rehnquist, J., dissenting). *See also* Southern P. R.R. v. United States, 168 U.S. 1, 55-61 (former judgment held conclusive even though estoppel not specially pleaded).

The rationale for *sua sponte* action on questions of preclusion is that relitigation should be precluded not simply to serve defendant's interest in avoiding litigation, but also to avoid judicial waste and to foster reliance on judicial decisions. Wilson v. United States, *supra*, 166 F.2d at 528-29; *see generally* Montana v. United States, 440 U.S. 147, 153-54 (1979) *and authorities cited*. The defendant's consent to relitigation cannot always be decisive, for there is an

Taxation challenges the Tax Code's denial of tax benefits to otherwise qualified organizations which engage in substantial lobbying on what it views as two independent grounds. First, it asserts that section 501(c)(3), by conditioning tax benefits on the non-exercise of an organization's rights of speech, press, and petition, violates the first amendment. This attack does not rely on any distinctions drawn by the Code among organizations, but rather proceeds from the premise that the lobbying restriction is invalid, regardless of the uniformity of its application, as a burden on protected speech. *See* Taxation Br. at 15. Second, Taxation argues that the Code, by placing restrictions on the lobbying activities of section 501(c)(3) organizations while placing no similar restrictions of those of veterans' organizations defined in section 501(c)(19) or fraternal orders defined in sections 501(c)(8) and (10), denies it the equal protection of the laws guaranteed by the fifth amendment's due process clause.[10]

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independent public interest "in preventing the misallocation of judicial resources and second guessing prior panels of Art. III judges when the issue has been fully and fairly litigated in a prior proceeding." United States v. Sioux Nation, *supra*, 448 U.S. at 433 (Rehnquist, J., dissenting).

We are thus tempted to determine whether Taxation should be estopped to litigate the same issues on which Taxation with Representation lost in the 4th Circuit. However, the Government's failure to plead preclusion at any stage of this litigation deprived Taxation of an opportunity to argue that such defense should not apply, and it is not clear that Taxation has no arguable objection to such application. We thus have a choice of remanding for a hearing on that issue, *see, e.g.*, Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation, 402 U.S. 313 (1971) (remanding to permit defendant to plead collateral estoppel and plaintiff to challenge the plea), or of disposing of Taxation's case on the merits. The original panel determined that judicial economy would be best served by taking the latter course, and so proceeded to the substantive issues, as we have determined to do here.

[10] "[I]f a classification would be invalid under the Equal Protection Clause of the Fourteenth Amendment, it is also inconsistent

II.

Taxation's first claim is based on the contention that the statutory denial of tax benefits to organizations that engage in subsantial lobbying places an "unconstitutional condition" upon the enjoyment of those benefits.[11] The cornerstone of this argument is *Speiser v. Randall*, 357 U.S. 513 (1958), in which the opinion of Justice Harlan for the Court established the proposition that the enjoyment of a government-conferred benefit cannot be made contingent upon compliance with a condition that violates the first amendment rights of one who would otherwise qualify for the benefit.[12] Taxation urges that the lobbying restriction in section 501(c)(3) imposes precisely such a condition. This contention, as the majority recognizes, is without merit.

Taxation does not claim that the challenged provisions "chill" its speech by imposing a *direct* restriction or penalty upon its lobbying activities. Nor, moreover, does it claim that the effectiveness of its presumed "charitable

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with the due process requirement of the Fifth Amendment." Johnson v. Robison, 415 U.S. 361, 364 n.4 (1974). *See* Buckley v. Valeo, 424 U.S. 1, 93 (1976).

[11] We consider primarily the denial of tax exemption for Taxation's own income, but note that there is no serious question as to Taxation's standing to challenge conditions upon the deductibility of donors' contributions to it. It is our understanding that in doing so, Taxation is asserting its *own* rights, and not the rights of third party potential donors not before the court.

[12] *Speiser* invalidated a requirement that persons seeking to qualify for a state constitutional property tax exemption for veterans sign a loyalty oath. The Court held that the requirement improperly created a presumption of disloyalty on the part of applicants the burden of overcoming which impermissibly chilled the applicants' exercise of their speech rights. "The man who knows that he must bring forth proof and persuade another of the lawfulness of his conduct necessarily must steer far wider of the unlawful zone than if the state must bear these burdens." 357 U.S. at 526.

and educational" activities—in fact, lobbying of Congress —is diminished by the bare fact, without more, of its non-exempt status. Taxation's claim is confined to the assertion that because it does not qualify as an exempt organization under section 501(c)(3), it is rendered significantly less able to raise funds in support of its activity.[13] Even if government has no obligation to support its activities either directly or through the tax structure, Taxation argues, the decision to provide or withhold such support cannot permissibly turn upon whether or not it exercises its first amendment right to lobby.

The condition placed upon Taxation plainly has its *direct* effect not upon speech, but upon fundraising. This fact does not, however, render the protections of the first amendment inapplicable, for it is well established that "the Constitution's protection is not limited to direct interference with fundamental righs." *Healy v. James*, 408 U.S. 169, 183 (1972). "Even where a challenged regulation restricts freedom of expression only incidentally," the first amendment demands heightened judicial sensitivity. *Schad v. Borough of Mount Ephraim*, 101 S. Ct. 2176, 2183 n.7 (1981). *See also Buckley v. Valeo*, 424 U.S. 1, 21 (1976); *Bates v. City of Little Rock*, 361 U.S. 516, 423 (1960). The question whether the condition placed upon exempt status by section 501(c)(3) violates any right guaranteed Taxation by the first amendment therefore deserves thorough examination.

I agree that lobbying is an activity generally protected by the first amendment. I also agree for the purposes of this case that Taxation possesses in general the same rights of speech and petition guaranteed other persons. *See First National Bank v. Bellotti*, 435 U.S. 765 (1978). But in my view, under the specific circum-

[13] As the Supreme Court has noted, many contributors "simply will not make donations to an organization that does not appear" on the Cumulative List of exempt organizations published by the IRS. Bob Jones University v. Simon, 416 U.S. 725, 729-30 (1974).

stances of this case, Congress could constitutionally condition the availability of tax benefits upon an agreement not to engage in substantial lobbying. In this instance, the reach of Taxation's right to lobby can be determined only in the context in which that right is asserted.[14] By holding itself out as a charitable or educational organization and laying claim to the tax benefits accorded such organizations, Taxation has assumed a status which Congress may constitutionally regard as incompatible to some extent with the carrying on of substantial political activities, and which may therefore be made subject to conditions upon its enjoyment that would otherwise be impermissible.

In first amendment cases, the threshold question of the level of scrutiny applicable to the challenged provision turns upon whether the alleged restriction is one based upon the "content" of the communication sought to be protected. Where speech is restricted because of its content rather than because of its incidental effects on governmental interests the Constitution demands strict judicial scrutiny. Satisfaction of that standard requires the government to demonstrate "that its regulation is necessary to serve a compelling interest and that it is narrowly drawn to achieve that end." *Widmar v. Vincent*, 102 S. Ct. 269, 274 (1981). In contrast, where a restriction, though trenching on speech, is directed not at the content of the speech, but at the "nonspeech" elements of the restricted activity, government bears the considerably lighter burden of showing that the restriction furthers an "important or substantial governmental interest" and is "no greater than is essential to the furtherance of

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[14] As Taxation conceded in its brief before the original panel in this case, "in establishing a benefit program, the Government may include requirements that are necessary to assure that the objects of the program are attained." Taxation Br. filed 8/1/79 at 14 n.5. *See* Buckley v. Valeo, 424 U.S. 1, 57 n.65 (1976); Community-Service Broadcasting of Mid-America, Inc. v. FCC, 593 F.2d 1102, 1129 (D.C. Cir. 1978) (en banc); Note, *Unconstitutional Conditions*, 73 HARV. L. REV. 1595, 1600 (1960).

that interest." *United States v. O'Brien*, 391 U.S. 367, 377 (1968). *See Consolidated Edison Co. v. Public Service Commission*, 447 U.S. 530, 540 n.9 (1980).

For the reasons set forth below, I view the lobbying restriction in section 501(c)(3) as one unrelated to the content of protected speech. I have no difficulty in finding that the governmental interest expressed by the restriction is a substantial one, and that the means Congress has chosen to protect that interest are sufficiently narrow to satisfy the Constitution. Consequently, in my opinion Taxation's argument that the lobbying restriction in section 501(c)(3) is an "unconstitutional condition" upon the enjoyment of the tax benefits Taxation seeks to finance its substantial lobbying should be rejected.

A.

Taxation argues that the lobbying restriction is one "based on the type of speech or the subject matter" of protected expression, and therefore merits strict scrutiny. Taxation Br. at 15. However, the argument plainly fails when one compares section 501(c)(3) with the types of statutes invalidated by the Supreme Court as "content-based" restrictions on speech. Section 501(c)(3) is not a restriction based on content. It is not aimed at the "message" or "communicative impact" of Taxation's activities, but rather at confining tax-supported organizations to those activities Congress deems worthy of encouraging by public support through the tax system. The restriction is directed neither toward controlling what Taxation's audience may hear, nor toward controlling Taxation's message because of its viewpoint or subject matter. It simply regulates the activities of an entity which happens to be, *inter alia*, a speaker, and is imposed for reasons wholly unrelated to the message Taxation seeks to convey.[15] The fact that the statute

[15] *See generally* Redish, *The Content Distinction in First Amendment Analysis*, 34 STAN. L. REV. 113, 114-118 (1981).

in terms specifically restricts activities a "substantial part" of which is "carrying on propaganda, or otherwise attempting to influence legislation" cannot support the inference that the provision is one aimed at any particular subjects or viewpoints.

The Supreme Court's decisions invalidating content-based restrictions on speech demonstrate that strict first amendment scrutiny is reserved for those instances in which the government has sought specifically to "dictat[e] the subjects about which persons may speak and the speakers who may address a public issue." *First National Bank v. Bellotti*, 435 U.S. 765, 785 (1978). The application of this high standard is appropriate "[e]specially where . . . the legislature's suppression of free speech suggests an attempt to give one side of a debatable public question an advantage in expressing its views . . . ." *Id.* Even where the motive of Congress in enacting a restriction bearing on speech has been claimed to be non-neutral with respect to content, *see United States v. O'Brien*, *supra*, the Court has refused to apply strict scrutiny. It has confined application of that test to cases in which the government's asserted interest is *directly related* to the *content* of the restricted communication. *See, e.g.*, *Widmar v. Vincent*, *supra*, 102 S. Ct. 269 (1981) (invalidating, on free speech grounds, state university rules that generally permitted use of campus facilities but denied use for religious purposes); *Metromedia, Inc. v. San Diego*, 101 S. Ct. 2882 (1981) (invalidating ordinance that permitted commercial expression while prohibiting noncommercial expression in identical circumstances); *Central Hudson Gas & Electric Co. v. Public Service Commission*, 447 U.S. 557 (1980) (invalidating regulation that prohibited utility from promoting use of electricity); *Consolidated Edison Corporation v. Public Service Commission*, 447 U.S. 530 (1980) (invalidating regulation that prohibited utility from expressing views on "controversial issues of public policy"); *Carey v. Brown*, 447 U.S. 455 (1980) (invalidating ordinance that per-

mitted labor picketing while prohibiting other picketing); *Police Department v. Mosley*, 408 U.S. 92 (1972) (same).[16]

Where neither discrimination among viewpoints nor among subjects of discussion is involved, the concerns prompting strict scrutiny are absent. The lobbying restriction imposed in section 501(c)(3) does not "dictat[e] the *subjects* about which persons may speak and who may address *a* [*given*] *public issue*," and certainly does not "suggest an attempt[] to give *one side* of a debatable public question an advantage in expressing its views . . ." *First National Bank v. Bellotti*, *supra*, 435 U.S. at 785 (emphasis added). The statute merely reflects Congress' determination that groups claiming exemption from the normal obligations imposed by the tax laws must devote the resources thereby gained to the purposes for which Congress granted the exemption in the first place.[17]

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[16] We focus on cases relating to content restrictions based upon *subject matter* because they involve the Court's broadest reading of the term "content." In cases involving the invalidation of restrictions based on the *particular viewpoint* of a speaker on a given subject, the distinction between such restrictions and § 501(c)(3) is even plainer. *See, e.g.*, First Nat'l Bank v. Bellotti, 435 U.S. 765 (1978) (invalidating statute which limited corporate speech to protection of corporations' business interests).

[17] This is not the type of legislative directive to "stick to business" invalidated in *First National Bank v. Bellotti*, *supra*, 435 U.S. at 785 ("If a legislature may direct business corporations to 'stick to business,' it may also limit other corporations—religious, charitable or civic—to their respective 'business' when addressing the public."). The statute struck down in that case limited corporate speech on referendum issues to instances in which the corporation's interests were presumed (by the statute itself) to be affected. Section 501(c)(3) does not operate in any way to restrict the subjects upon which Taxation may lawfully speak, nor does it condition Taxation's receipt of tax benefits upon the subjects it addresses. *The lobbying restriction is entirely neutral with respect to the subject matter of the legislation sought to be influenced.* Section 501(c)(3) merely requires charitable and educational or-

The restriction imposed by § 501(c)(3) is not rendered invalid merely because it requires organizations enjoying exempt status to confine themselves to largely non-political activities. The ordinance invalidated in *Village of Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620 (1980), somewhat similarly restricted the activities of charitable groups by requiring that they spend at least 75 percent of their receipts directly for "charitable purposes." A principal difference between that restriction and the one involved here is that the Schaumburg ordinance burdened an activity (solicitation of funds door-to-door) "characteristically intertwined" with speech. A second significant difference, however, is that the restriction in *Schaumburg* was defended primarily as one that sought to prevent fraud upon donors.[18] Section 501(c)(3) has an entirely different purpose. Here, the government has conferred tax benefits on the organization seeking taxpayer support in order to encourage particular kinds of activity in the public interest, and has imposed the lobbying restriction as a means to insure that that benefit is issued *directly* to further the purposes Congress sought to encourage in granting the benefit.[19]

B.

The foregoing establishes that this case does not concern a *content*-based restriction on speech. It remains to decide whether the lobbying restriction satisfies the lower

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ganizations to spend the fruits of their special tax status in ways that Congress finds to be consistent with the purposes for which that status was created, *i.e.*, to further charitable and educational purposes. *See* discussion at 15-17 *infra*.

[18] The other asserted governmental interest was protection of residents' privacy from the intrusions of door-to-door solicitors. 444 U.S. at 638-39.

[19] The nature of the governmental interest expressed by the lobbying restriction is more fully discussed at 15-17.

standard of first amendment review imposed by *United States v. O'Brien*, *supra*, 391 U.S. 367 (1968).[20] That standard is, as stated above, whether the law in question serves an "important or substantial governmental interest" whose "incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest." *Id.* at 377. It is my conclusion that section 501(c)(3) satisfies both concerns.

1. *Governmental Interest*

Taxation argues that there is no clear statement in the legislative history of section 501(c)(3) of the purpose Congress sought to achieve in imposing the lobbying restriction as a condition on the enjoyment of tax benefits, and claims that the statute is therefore supported only by "*post hoc* and speculative arguments of Government counsel, which are constitutionally insufficient." Taxation Br. at 16. I disagree. The interests Congress sought to further are clear, and clearly suffice to justify the statute.

Where legislative intent is manifest in the words or obvious effect of a statute itself, the absence of comment thereon in the hearings, reports, or floor debates of Congress is not to be taken as evidence that the statute is devoid of rational purpose. *See Boys Markets, Inc. v. Retail Clerks Union, Local 770*, 398 U.S. 235, 241 (1970). So-called "*post-hoc*" arguments are permissible to interpret and support congressional enactments. Congress is not an administrative agency that is required to state the grounds upon which it acts, and courts do not interfere with the powers of Congress when exercising their judicial power to interpret federal statutes. *Cf. Securities and Exchange Commission v. Chenery Corporation*, 332

[20] The Supreme Court recently reaffirmed the appropriateness of the *O'Brien* standard in cases not involving content-based restrictions. Consolidated Edison Co. v. Public Svc. Comm'n, 447 U.S. 530, 540 n.9 (1980).

U.S. 194, 196 (1947); *id.*, 318 U.S. 80, 95 (1943). It is not necessary in its legislative record for Congress to explain every provision of every statute and foresee every argument that may be asserted in support of or against its enactments. This is as true in the first amendment context as it is elsewhere. *See, e.g., Buckley v. Valeo*, 424 U.S. 1, 106 (1976). Although the fact is often forgotten, statutes can often be interpreted by reference to their plain terms without reference to extraneous sources. This is such a statute. Read in the context of the plain purpose of section 501—to benefit certain groups performing various services that Congress views as being in the public interest[21]—subsection (c)(3) clearly indicates a congressional intent to encourage certain activities viewed as charitable and educational.

The lobbying restriction, since it cannot successfully be attacked on the ground that it discriminates among organizations based upon the content of their speech, can only sensibly be read as an attempt to confine such groups to purposes that are directly charitable or philanthropic. As Judge Wilkey has stated, the lobbying restriction in section 501(c)(3) *"is aimed at assuring some purity in that purpose."*[22] Similarly, a committee report interpreting the provision shortly after its original enactment stated:

> The exemption . . . is based upon the theory that the Government is compensated for the loss of revenue by its relief from financial burden which would other-

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[21] A survey of the various exemptions stated in § 501(c) will reveal the general types of interests Congress sought to protect. *See* I.R.C. § 501(c)(1)-(22).

[22] "Americans United," Inc. v. Walters, 477 F.2d 1169, 1183 (D.C. Cir. 1973) (concurring opinion), *rev'd on jurisdictional grounds sub nom.* Alexander v. "Americans United" Inc., 416 U.S. 752 (1974) (emphasis in original). *See also* Bob Jones University v. Simon, 416 U.S. 725, 772 & n.8 (1974) (Blackmun, J., dissenting); Haswell v. United States, 500 F.2d 1133, 1150 (Ct. Cl. 1974).

> wise have to be met by appropriations from other public funds . . .

H.R. Rep. No. 1860, 75th Cong., 3d Sess. 19 (1938). Congress could reasonably conclude that limiting the lobbying activities of educational and charitable organizations was a proper means of ensuring that the benefits these organizations produce will be received by the intended beneficiaries.

Although it is unnecessary, in the absence of evidence indicating a contrary intention, to seek further justification in the legislative history for the lobbying restriction, it merits noting that contrary to Taxation's claims, there is a strong indication of Congress' intent in imposing that regulation. The floor debate on amendments to the Revenue Act of 1934, in which section 501(c)(3) (section 23(o) of the 1934 Act) has its origin, contains discussion the significance of which cannot be obscured by its brevity.

In a colloquy between Senator Reed of Pennsylvania and Senator Harrison, the concern was raised that the language restricting propaganda and attempts to influence legislation—the precise language found in the statute today—would have the effect of denying exempt status to organizations such as "the Society for the Prevention of Cruelty to Children, or the Society for the Prevention of Cruelty to Animals, or any of the worthy institutions that we do not in the slightest mean to effect." 78 Cong. Rec. 5861 (1934) (remark of Sen. Reed). Although he specifically noted and endorsed this desire on the part of Congress to protect the activities of such philanthropic groups, Senator Reed voiced the position of the Senate Finance Committee that "[t]here is no reason in the world why a contribution . . . should be deductible as if it were a charitable contribution *if it is a selfish one* made to advance the personal interests of the giver of the money. *That is what the committee was*

trying to reach . . ." *Id.* (emphasis added).[23] Despite the fact that Senator Reed personally favored a narrower restriction, Congress, having before it the above interpretation by a leading member of the committee charged with responsibility for tax matters, adopted the language presently found in section 501(c)(3). Even if the statutory language were thought to leave substantial doubt about the purpose sought to be achieved by the lobbying restriction, this revealing history resolves any question about the intent of Congress in adopting it.

Thus interpreted, it is beyond question that the lobbying restriction serves an "important and substantial' interest of the United States. The encouragement of charity, education, and similar objectives through the tax system, like that achieved by direct congressional appropriations for such purposes, is an interest whose legitimacy cannot seriously be doubted. The interests served by the activities of the organizations enumerated in section 501(c)(3) are well within both the power of Congress to serve the public interest and the traditional scope of the exercise of that power.

2. *The Scope of the Restriction*

Taxation's final argument against section 501(c)(3) is that, even conceding the government to have an important and substantial interest that is served by the restriction, the restriction is invalid because it is broader "than is essential to the furtherance of that interest." *United States v. O'Brien*, *supra*, 391 U.S. at 377. Even where a restriction on speech is not directed at content, the first amendment imposes the requirement that government adopt the means of achieving its purpose that is least restrictive of first amendment interests. *Village of Schaum-*

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[23] The majority suggests that "it would be grossly simplistic" to attribute much significance to this exchange. Majority op. at 44. Since I take the view that this evidence only confirms the intent obvious from the face of the statute, extended discussion of the proper weight to be accorded it is unnecessary.

burg v. Citizens for a Better Environment, 444 U.S. 620, 636 (1980).

Taxation's argument is based upon the fact that *all* tax benefits emanating from section 501(c)(3) are denied to any organization a "substantial part of the activities of which" is lobbying. This, Taxation alleges, renders the restriction broader than necessary to achieve Congress' purpose, in that if Congress sought only to deny tax benefits to organizations engaged in "selfish" activity, and so to deny deductibility to their contributors, the achievement of that end requires only that *that portion* of contributions *actually used* for the prohibited "selfish" purposes be treated as nonexempt and non-deductible. The remainder of the funds, used for purposes not expressly forbidden, would continue to qualify for exemption and deductibility.

The accuracy with which government defines categories of citizens for the purposes of regulation is a matter of particular importance when first amendment interests are at stake. *Central Hudson Gas & Electric Corp. v. Public Service Commission*, 447 U.S. 557 (1980). Courts in such circumstances are not relieved, however, of their duty to respect the superior competence and concomitant authority of the legislature in devising means of regulation. As was held in *Buckley v. Valeo*, 424 U.S. 1, 30 (1976), "Congress' failure to engage in such fine tuning does not invalidate" legislation, even where the legislation in question burdens first amendment freedoms of speech and association. *See also, id.* at 83, 103.[24] It

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[24] Judges and commentators have frequently noted the dangers inherent in judicial attempts to refine regulatory schemes, even where undertaken in order to enforce compliance with the first amendment. *See, e.g.*, Central Hudson Gas & Electric Corp. v. Public Service Comm'n, *supra*, 447 U.S. at 599-606 (1980) (Rehnquist, J., dissenting); Cox, *The Supreme Court, 1970 Term—Foreword: Freedom of Expression in the Burger Court*, 94 HARV. L. REV. 1, 35 (1980) (questioning the "close judicial analysis of

has long been recognized that this deference to legislative competence is particularly appropriate where the regulation involved is a system of taxation. *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 41 (1973); *Madden v. Kentucky*, 309 U.S. 83, 88 (1940).

I reach the same conclusion as the majority and view the Code as a whole as a scheme of regulation that is sufficiently narrow to satisfy first amendment concerns. In my opinion, the recent enactment of section 501(h) of the Code provides an insight into Congress' choice of means in regulating charities that compels the conclution that section 501(c)(3) is valid.[25]

Before proceeding to a discussion of the terms of section 501(h) and their relationship to section 501(c)(3), it is important to note the significance of that relationship. Section 501(h) is the product of an extensive effort by Congress to establish precise limits on the political activity of charitable organizations.[26] In effect, *section 501*

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policy alternatives [in *Central Hudson*], with the burden put upon the state to foresee and negate all the alternatives that the Court can imagine . . .").

[25] The parties did not focus on the significance of § 501(h) in their arguments before this court. Taxation's ability and willingness to elect coverage under § 501(h), *see* discussion at 22-24 *infra*, need not be considered, however for we rely on that section not simply as affording Taxation of less restrictive alternative in fact, but also as a source of guidance in evaluating the existing scope of § 501(c)(3).

[26] At least as early as 1972, Congress held hearings on the problems posed by § 501(c)(3)'s lobbying restriction. *See* Legislative Activity by Certain Types of Exempt Organizations: Hearings Before the House Comm. on Ways and Means, 92d Cong., 2d Sess. (1972). Several bills were introduced in earlier sessions on the subject prior to the ultimate adoption of section 501(h) by the 94th Congress in Pub. L. No. 94-455, 90 Stat. 1520 (1976). *See* H.R. REP. No. 94-1345; 122 Cong. Rec. 16886 (June 8, 1976). According to Congressman Ullman, the sponsor of the bill that ultimately became § 501(h), "further decisions were made in committee markup sessions in 1974 . . . Throughout 1975, the

(h) constitutes the congressionally-engineered "less restrictive alternative" to the lobbying restriction in section 501(c)(3). Rarely are courts in our position presented with such a ready-made, legislatively-created solution to the sort of first amendment problem raised here. We should therefore recognize that this action by Congress is entitled the great weight.

In addition to this prudential aspect of the relationship between the two subsections, there is an important logical connection. On the one hand, if section 501(h) truly offers a less restrictive alternative than section 501(c)(3) to organizations like Taxation, Taxation's remedy is to proceed under subsection (h) rather than under (c)(3).[27] If, on the other hand, section 501(h) is an *equally* or *more* restrictive means of confining charities to their proper purposes, one should be extremely reluctant to hold that Congress can and must produce a still better resolution of the competing interest than it has in either 501(h) or 501(c)(3). Bearing in mind the effort Congress has made to resolve these interests precisely, and this court's limited authority to second-guess that determination, I proceed to an examination of the purpose and effect of section 501(h).

Section 501(h) was enacted as part of the Tax Reform Act of 1976, Pub. L. No. 94-455 § 1307, 90 Stat.

Treasury Department, many of the charitable organizations interested in these proposals, and representatives of major religious organizations all joined with staff members to reach agreements ..." *Id.*

(Although section 501(h) and its related provisions were passed as part of the Tax Reform Act of 1976, Pub. L. No. 94-455, the tax writing committees of both houses originally considered the measure as a separate bill, H.R. 13500. *See* H.R. REP. No. 94-1210; S. REP. No. 94-938; S. REP. No. 94-1236 (conference report) (all 94th Cong., 2d Sess. (1976)).

[27] Taxation has declined to do so. We discuss the significance of this decision at 22-24, *infra*.

1720 (1976). It permits organizations described in section 501(c)(3) to opt out of regulation under the "substantial part" standard of (c)(3) and come under precise quantitative limitations on the amount they may spend on influencing legislators ("lobbying expenditures") and the public ("grass roots expenditures"). I.R.C. § 501(h)(2)(A), (C). Generally speaking, any section 501(c)(3) organization that is not a church may so elect. I.R.C. § 501(h)(5). By electing to be treated under section 501(h), an organization is permitted, subject to certain disclosure requirements, to expand on lobbying and "grass roots" political activity up to 25% of the amount it spends on exempt purposes specified in section 501(c)(3).[28] Expenditures in excess of this ceiling amount result in the imposition of a 25% tax on the excess. I.R.C. § 4911(a)(1).

The history of attempts to clarify and quantify the limits on the political activity of exempt organizations which culminated in the adoption of section 501(h) in 1976 is a fine example of congressional activity in response to first amendment concerns. The features of section 501(h) and its related provision, section 4911, combine to satisfy any valid objection that Taxation may have to the lobbying restriction. First, they represent a clear statement of Congress' understanding of the relationship between charitable purposes and political activity. Any ambiguity of purpose claimed to underlie the section 501(c)(3) lobbying restriction, *see* Taxation Br. at 16; majority op. at 45, is resolved by section 501(h)'s treatment of the subject.[29] Second, Taxation's objection

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[28] I.R.C. § 4911(c) sets forth the formulae for determining the maximum expenditures permitted.

[29] Congress in facing the question of legislative activity by exempt organizations could have chosen to repeal the lobbying restriction. This it declined to do, suggesting that doubts about the purpose of that section as adopted in 1934 are largely misconceived.

that section 501(c)(3) denies *all* tax benefits to an organization that does *some* (i.e., a more than an insubstantial amount of) lobbying, is addressed by section 4911's 25% tax on excess lobbying expenditures. I.R.C. § 4911 (a). The loss of tax benefits is, under this system, directly proportional to the extent of the organization's lobbying activity, eliminating the alleged "massive overkill" effect of section 501(c)(3). *See* Taxation Br. at 17. Finally, the legislative history and structure of section 501(h) illustrates the weakness of the claim, *see* Taxation Br. at 15, that Congress is seeking to regulate speech because of its communicative impact.[30]

It remains to be considered whether the availability of the section 501(h) alternative is relevant here. I believe that it is, notwithstanding the fact that Taxation has elected not to come under that section's coverage.

As noted previously, the chief significance of section 501(h) for the purposes of this case lies in the fact that it represents a recent congressional enactment to meet the problems that Taxation now raises. The statute indicates (1) that Congress finds that legislative lobbying activity might be compatible with charitable purposes to a *limited* extent, and (2) that any charitable organization wishing to engage in legislative activity should, in the judgment of Congress, be subject to well-defined regulatory limits on their lobbying activities. Whether or not an organization

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[30] Particularly noteworthy is § 4911's "sliding scale" definition of the permitted level of political expenditures. This provision was included as an alternative to the § 501(c)(3) "substantial part" test, which created the possibility that two organizations of different size which spend the same dollar amount on lobbying would be treated differently because that amount bears a different relationship to the *total* expenditures of the organizations. *See* 122 Cong. Rec. S16884 (daily ed. June 8, 1976); *see also* "Americans United," Inc. v. Walters, 477 U.S. 1169, 1173 (D.C. Cir. 1973), *rev'd on jurisdictional grounds sub nom.* Alexander v. "Americans United" Inc., 416 U.S. 752 (1974).

chooses to elect coverage under section 501(h), these congressional determinations must be respected.

Although Taxation from all indications in the record would qualify for treatment under section 501(h), it testified before the District Court that it elected not to be so treated:

> [Taxation] has not made and does not plan to make, an election under section 501(h) and 4911 of the Code. Such an election might require us to accept restrictions which are not justified or authorized under the First Amendment of the Constitution, on our right to communicate with our contributors and members regarding matters of legislative interest. Section 501(h) and 4911 also fail to define with any narrow specificity such terms as "legislative activities" and "taxable expenditures". For this reason, an election under section 501(h) might require us to impose prior restraints on the publication of Articles in our weekly tax news-magazine, Tax Notes. An election under section 501(h) might also require us to accept limitations on our legislative activities which we believe are unconstitutional and which are not imposed on similarly situated tax exempt organizations, such as, for example, trade associations, fraternal societies, labor unions, veterans organizations, and in practice, churches. In addition, the income of an organization such as Taxation with Representation of Washington normally fluctuates widely from year to year. Therefore as a practical matter, a percentage test—such as that in section 501(h)—to determine the permissible level of spending on legislative activities is unworkable.

Field Aff. a 2-3 (J.A. at 15-16).

Except for the same complaints of discriminatory treatment that it raises in this case, Taxation's alleged reasons for choosing to remain under section 501(c)(3) amount to conclusory objections to (1) the specificity of statutory

terms in sections 501(h) and 4911, and (2) the "workability" of a quantitative expenditure limitation. These questions regarding section 501(h) are obviously not suited for resolution here.[31] However, we do not believe that this precludes us from recognizing the existence of the statute or the congressional determinations that it represents. Although Taxation cannot be compelled to elect coverage under section 501(h), this does not mean that its present case must be evaluated as if that statutory alternative did not exist.

From the foregoing, it is submitted that Congress has legitimately drawn a distinction between charitable organizations that engage in substantial lobbying and those that do not. The restrictions to which an organization is subject depend upon the extent of its exercise of the right to lobby, but in any event, those restrictions serve a clearly valid public interest and are drawn with sufficient precision to comport with the requirements of the first amendment.

III.

Next to be considered is Taxation's second claim that imposing the lobbying restriction on the activities of section 501(c)(3) organizations, while placing no similar restriction upon fraternal organizations exempted by section 501(c)(8) and (10) or veterans' groups exempted by section 501(c)(19), discriminates against Taxation in a constitutionally impermissible manner. This claim is similarly rejected.

Recent legislative attempts to deal with the complex relationship of money, politics, and constitutional guarantees

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[31] It is noted that Taxation, while advertising in its affidavit to the alleged vagueness of terms used in §§ 501(h) and 4911, raised no similar vagueness objections to § 501(c)(3). Considerable deference should also be paid to the specific quantitive standards set forth in the statute. *See* Buckley v. Valeo, 424 U.S. 1, 30, 83 (1976).

have provided the Supreme Court with several opportunities to set forth the standards applicable here. Those standards support the conclusion that Congress has acted consistently with the requirements of the first amendment.

In evaluating any claim of unlawful discrimination, whether under the constitutional strictures of the first, fifth and fourteenth amendments or under some other provision of law, it must be remembered that "[s]ometimes the grossest discrimination can lie in treating things that are different as though they were exactly alike . . ." *Buckley v. Valeo*, 424 U.S. 1, 97-98 (1976), *quoting Jenness v. Fortson*, 403 U.S. 431, 441-42 (1971). It cannot simply be presumed that two parties, one of who complains of treatment different from that received by the other, are situated so similarly that the difference rises to the level of "discrimination." Obviously, differential treatment of members of *different* classes of persons cannot be equated with differential treatment of persons identically situated. Constitutional scrutiny of an alleged "discrimination," in short, presupposes that the essential characteristics of the complaining party are in the main indistinguishable from the characteristics of those who are alleged to be treated more favorably. Equal protection does not require that "things which are different in fact . . . be treated in law as though they were the same." *Tigner v. Texas*, 310 U.S. 141, 147 (1940).

We take it as beyond dispute that were Congress to preserve the existing benefit provisions favoring veterans' organizations while *wholly eliminating* those afforded other charitable organizations, Taxation would be without a colorable claim of discrimination under the first or fifth amendments.[32] Generally speaking, Congress is free, subject to the minimal constraint of "rationality," [33] to

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[32] *See*, maj. op. Part IIA.

[33] *See* New Orleans v. Dukes, 427 U.S. 297, 303 (1976) (per curiam).

determine that veterans' groups are worthy of those benefits while other groups with charitable or educational purposes are not. The fact that veterans' organizations would be permitted to engage in lobbying among their other activities [34] would not be cause for Taxation to complain of congressional discrimination favoring veterans' speech over its own. Government is free to choose the interests to which it offers support via the tax structure, even if as a result some groups are able to exercise their speech rights at a lower effective cost than are others.[35]

The foregoing would not establish the constitutionality of a measure that conditioned receipt of a benefit by one group over another on the basis of particular political views or interests, nor that of one which imposed a direct burden on protected speech. What it does establish, however, is that when Congress determines that two organizations serve significantly different purposes, or present significantly different regulatory problems, the Constitution does not require it to afford them identical treatment.

The fatal defect in the majority opinion is its failure to recognize the different regulatory considerations presented by veterans' groups [36] and 501(c)(3) organiza-

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[34] Assuming the absence of other congressional limits upon such activity. Limits of this sort in fact presently exist with respect to veterans' organizations chartered by Act of Congress. *See, e.g.*, 36 U.S.C. § 90f (1976) (DAV shall be nonpolitical and may not support any candidate for office). These are discussed at 33-34 *infra*.

[35] A contrary rule would place upon government the obligation of providing equal resources to all who would publish their views on any subject. That no such obligation exists is obvious, as the majority notes. Maj. op. at 22.

[36] Because the majority appears to agree that the statute read in conjunction with Treasury regulations does in fact restrict the lobbying activities of fraternal societies in a fashion similar to § 501(c)(3), this discussion is confined to Taxation's claims regarding veterans' groups.

tions. The majority adopts the tacit assumption that, but for the lobbying restriction, Taxation is for all relevant purposes legally indistinguishable from veterans' groups. The majority therefore draws the conclusion that the difference in treatment permitted by that restriction is discrimination touching on the fundamental right of free speech. I disagree strongly with the assumption that Taxation and veterans' groups are identically situated with respect to the purposes of Congress in conferring these tax benefits, and consequently cannot accept the conclusion the majority draws from it.

The majority appears to view veterans' organizations simply as 501(c)(3) organizations which happen for purely technical reasons to occupy a separate Code subsection, 501(c)(19). That view ignores both Congress' own understanding of the Tax Code's provisions and the unique character, status and function of veterans' groups under the laws of the United States. Insofar as these reveal important differences between veterans' groups and charitable or educational groups in general, nothing in the first or fifth amendments forecloses Congress from legislating on the basis of those differences as it has done here. Far from being essentially fungible charities, Taxation and veterans' groups are fundamentally different in their purposes, their operations, and their responsibilities under the law. Those differences lead to the conclusion that Taxation has not been subjected to unconstitutional discrimination.

The fact that veterans' groups are treated in a statutory provision (501(c)(19)) distinct from the general exemption for charitable and educational organizations in section 501(c)(3) itself tends to suggest that Congress viewed these groups as essentially different types of organizations. The majority attributes this separate treatment to purely technical reasons, namely, the need to insulate veterans' organizations from the tax imposed on unrelated business income by the Tax Reform Act of

1969. Maj. Op.. at 40. *See* S. Rep. No. 92-1082, 92d Cong., 2d Sess. (1972); H.R. Rep. No. 92-851, 92d Cong., 2d Sess. (1972). That attempted explanation is not sufficient.

First, it appears that at the time it enacted section 501(c)(19), Congress viewed veterans' organizations as falling *outside* the scope of section 501(c)(3). In stating their understanding of the existing law, the committee reports on section 501(c)(19) stated only that veterans' groups qualified as "social clubs" under section 501(c)(7) or as "social welfare organizations" under section 501(c)(4).[37] At the time Congress enacted 501(c)(19), then, it believed that veterans' groups were not classified with Taxation as 501(c)(3) groups subject to the lobbying restrictions.[38] It viewed veterans' organizations as falling into a class with groups entitled to enjoy tax-exempt status without any restriction on their political activities.

Second, the legislative evolution of the specific provisions for income, gift and estate tax deductions of contributions shows that Congress, having originally extended the benefits of exempt status and deductibility to all types of charitable and educational groups, subsequently determined to withdraw it only from section 501(c)(3) organizations that engaged in substantial attempts to influence legislation.[39] The basis for that de-

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[37] H.R. REP. No. 92-851, 92d Cong., 2d Sess. 2 (1972); S. REP. No. 92-1082, 92d Cong., 2d Sess. 2 (1972).

[38] Given this recent interpretation by Congress, the pre-1934 legislative history cited by the majority, maj. op. at 36-38, is of little value. Whatever one might make of the "pre-history" of the lobbying restriction, since 1934 Congress has without deviation taken the view that veterans' organizations and section 501(c)(3) organizations are essentially different in character.

[39] The initial focus of the decision to deny these benefits to groups that lobbied was not upon the organizations' exempt status, but upon the deductibility of contributions to them. The condition

cision need not be set forth explicity for it to be entitled to this court's respect, but the previously quoted debate on that action shows that Congress was cognizant of the distinction it was drawing.

This evolution of the present section 501(c)(3)—first extending the benefits of exemption and deductibility, later paring them back—is precisely the sort of response to social experience and legislative experiments that the Supreme Court has held most worthy of judicial deference. Contrary to the majority opinion, the rule that "reform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind" [40] is fully applicable to this case notwithstanding the presence of first amendment concerns. That is the unmistakable meaning of the Supreme Court's holding in *Buckley v. Valeo*, *supra*, 424 U.S. 1 (1976).

In *Buckley*, the Court was presented with a challenge to various featuures of the Federal Election Campaign Act of 1971, 2 U.S.C. § 431 *et seq.* (1976). Among the issues there presented was the claim that the provision of the Act providing for federal funding of primary election campaigns, which allowed no funds to candidates for office who did not run in primary elections, unconstitutionally discriminated against those candidates in violation of the first and fifth amendments. The Court rejected this challenge, holding that the different treatment

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placed upon exempt status which now appears in § 501(c)(3) was adopted in order to complement the denial of deductions for contributions to groups that lobby that is now § 170(c)(2)(D). *See* S. REP. No. 558, 73d Cong., 2d Sess. 30 (1934) (explaining change in exemption rules under the 1939 Code (prior § 101(6) by reference to change in deductibility under prior § 23(o)). This fact further supports the view that the principal intent of Congress in imposing the lobbying restriction was to curtail self-serving "donations" incompatible with the charitable purposes Congress sought to further.

[40] Williamson v. Lee Optical, 348 U.S. 483, 489 (1955).

was justified in view of Congress' power to structure the conduct of federal elections. The Court stated:

> [I]n deciding the constitutional propriety of the limitations in such a reform measure we are guided by the familiar principles that a 'statute is not invalid under the Constitution because it might have gone farther than it did,' *Roschen v. Ward*, 279 U.S. 337, 339, that a legislature need not 'strike at all evils at the same time,' *Semler v. Dental Examiners*, 294 U.S. 608, 610, and that 'reform may take one step at a time, addressing itself to the legislative mind,' *Williamson v. Lee Optical Co.*, 348 U.S. 483, 489.

424 U.S. at 105, *quoting Katzenbach v. Morgan*, 384 U.S. 641, 647 (1966) (footnote omitted).[41] In a footnote to this statement, the Court made explicit its holding that this understanding of Congress' power was fully applicable in first amendment cases of precisely the character that is present here. *See id.* at 105 n. 143.

The statute at issue in *Buckley* was an attempt by Congress to regulate the effects of massed private wealth upon federal elections. As such, it presented concerns lying at the very heart of the political freedom protected by the first amendment. The regulation imposed by sec-

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[41] The Court in *Buckley* cited the Campaign Act's character as a "reform" measure, *id.* at 105, 107. The courts have long recognized, as the already cited legislative history itself makes clear, that section 501(c)(3) is a similar sort of remedial measure. *See, e.g.*, Seasongood v. Commissioner, 227 F.2d 907, 910 (6th Cir. 1955); "Americans United," Inc. v. Walters, 477 F.2d 1169, 1183 (D.C. Cir. 1973) (Wilkey, J., concurring), *rev'd on jurisdictional grounds sub nom.* Alexander v. "Americans United" Inc., 416 U.S. 752 (1974). The status of an Act of Congress as a "reform" measure is a question to be determined by reference to the intent evidenced by Congress in adopting it, and not to the predilections of a reviewing court. "Evils in the same field may be of different dimensions and proportions, requiring different remedies. *Or so the legislature may think.*" Williamson v. Lee Optical, 348 U.S. 483, 489 (1955) (emphasis added).

tion 501(c)(3) can hardly be said to pose an equally or still more serious threat to those values.

When the specific actions of Congress relative to the status of veterans' groups, including its regulation of their political activities, are examined more closely than the majority is apparently willing to do, this conclusion is even more evident. Congress' decision in 1934 to limit the lobbying restriction to 501(c)(3) organizations—to take "one step at a time"—is amply supported by the contemporary and continuing "fact of American life"[42] regarding the unique status of veterans' organizations in our society. In view of this familiar social fact, Congress was clearly justified in focusing its attention on what it perceived to be the most serious abuse of the tax-exempt organization statutes, namely, the activities of the generally-described organizations presently defined in section 501(c)(3).[43]

War veterans have made unparalleled contributions to the creation and preservation of this nation. Their organizations have existed in this country from the beginning. These organizations have sought to aid disabled veterans, to assist their widows and orphans, and to provide for mutual support and assistance among those who served their country in time of war. *See generally* W. Glasson, Military Pension Legislation (1900). Some of these organizations play a vital continuing role in the administration of laws benefitting veterans, as Congress has specifically recognized and provided for. *See, e.g.*, 38 U.S.C. § 3402(a) (1976) (permitting veterans' or-

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[42] Buckley v. Valeo, 424 U.S. at 98.

[43] The fact that the reform implemented by the lobbying restriction was first adopted in 1934 does not undermine its status as a proper "first step." The various statutory changes adopted since that time—the enactment of sections 501(h) (discussed at 19-22 *supra*) and 527 (regulating political action committees)—illustrate the continuing attention paid by Congress to this area in the intervening years.

ganizations to represent veterans in presenting claims to Veterans' Administration and the furnishing of office space to them). The close coordination between veterans' organizations and the government is unique. Congress has continued to acknowledge the importance of veterans' organizations by incorporating them with federal charters in order to permit them to carry out their philanthropic purposes. *See, e.g.*, Pub. L. No. 97-83, 90 Stat. 1094 (Nov. 20, 1981) (chartering United States Submarine Veterans of World War II).[44] Because of the important and unique public role played by veterans' groups, Congress could properly regard them as a different kind of entity deserving *tax* treatment different from that accorded the more generally described charitable organizations subject to section 501(c)(3).

It could do this, as *Buckley* demonstrates, even though a perceived effect of the different treatment might be the creation of an indirect burden on other groups' first amendment interests. *Buckley* presented a regulatory provision which made the receipt of a financial benefit (campaign funding) contingent upon the past success of a candidate in primary elections.[45] That case, much more so than this one, tested a statute which made political success—and therefore, the content and consequent popularity of one's political ideas—a condition on the receipt of a benefit. The Court nevertheless upheld the provision as one enacted "in furtherance of sufficiently important governmental interests" with little practical

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[44] Other veterans' organizations are similarly incorporated. *See* note 47 *infra*.

Under standards adopted by the House and Senate Judiciary Committees, federal charters are granted only to organizations of "unique character," and which are "organized and operated solely for charitable, literary, educational, scientific, patriotic or civic improvement purposes . . . as nonpartisan and nonprofit organization[s] . . ." S. REP. No. 97-37, 97th Cong., 1st Sess. 2 (1981).

[45] Buckley v. Valeo, 424 U.S. at 97.

impact on the rights of the parties disadvantaged thereby. 424 U.S. at 95-96. Finding it evident that here, as there, "there are obvious differences in kind"[46] between veterans' organizations and section 501(c)(3) organizations, in my judgment the decision to restrict the lobbying activities of section 501(c)(3) organizations by placing a condition upon their receipt of tax benefits, without placing an identical condition upon veterans' organizations, was within the power of Congress.

Finally, it must be stressed that Congress *has in fact acted* to limit the lobbying and other political activities of the nation's more prominent veterans' groups, including the American Legion and AMVETS. The statutes governing these and other organizations of veterans chartered by Congress uniformly contain provisions barring them from engaging in partisan political activity and otherwise limiting the political involvements they may pursue. In incorporating the Disabled American Veterans, for example, Congress provided that it "shall be *nonpolitical* and nonsectarian, and as an organization shall not promote the candidacy of any person seeking public office." 36 U.S.C. § 90f (1976) (emphasis added).[47] Indeed, most recently Congress has imposed charter restrictions, *identical* to the restrictions of section 501(c)(3), upon the United States Submarine Veterans of World War II and the Italian American War Veterans of the United States. Their charters were granted in 1981 by Congress subject to the restriction that they "shall not contribute to, support or otherwise participate

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[46] *Id.*

[47] *See also* 36 U.S.C. § 46 (1976) (American Legion "shall be nonpolitical and, as an organization, shall not promote the candidacy of any person seeking public office"); *id.* § 67d ("No part of the activities of [American Veterans of World War II] shall consist of carrying on propaganda" or of supporting any political party or candidate); *id.* § 86 (Blind Veterans of World War I "shall be nonpolitical and shall not be used for the dissemination of partisan principles"); *id.* § 1153 (Paralyzed Veterans of America).

in *any* political activity *or in any manner attempt to influence legislation.*" [48]

To the extent that such direct limitations on the activities of veterans' organizations exist it is not even necessary to consider the extent to which the different treatment accorded them and section 501(c)(3) organizations within the provisions of the Tax Code is justified by the government's interest in veterans' affairs. For to that extent, veterans' groups operate under constraints essentially similar or even identical [49] to those imposed by section 501(c)(3) upon groups like Taxation, and hence no true "discrimination" in their favor occurs.[50] As the Supreme Court recently stated in *California Medical Association v. Federal Election Commission*, 101 S. Ct. 2712 (1981), in upholding section 441a(a)(1)(C) of the Federal Election Campaign Act,

> We have already concluded that § 441a(a)(1)(C) does not violate the First Amendment. In order to conclude that it nonetheless violates the equal protection component of the Fifth Amendment, we would have to find that because of this provision the Act burdens the First Amendment rights of persons subject to § 441a(a)(1)(C) to a greater extent than it burdens the same rights of corporations and unions,

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[48] Pub. L. No. 97-82 § 8(c), 90 Stat. 1092 (Nov. 20, 1981); Pub. L. No. 97-83 § 8(c), 90 Stat. 1095 (Nov. 21, 1981) (emphasis added).

[49] *See id.*

[50] This is most clearly the case in the instance of contributions sought to be deducted from the estate tax under section 2055(a)(4). That section makes contributions to veterans' organizations deductible only if the contribution is "to or for the use of any veterans' organization *incorporated by Act of Congress . . .*" Any conditions placed upon the political activities of these groups in their corporate charters, then, are *explicitly* incorporated into the provision governing the deductibility of contributions, and the effect is as if section 2055 itself imposed the restriction on political involvement.

> and that such differential treatment is not justified. *We need not consider this second question—whether the discrimination alleged by appellants is justified—because we find no such discrimination.* Appellants' claim of unfair treatment ignores the plain fact that the statute as a whole imposes far *fewer* restrictions on individuals and unincorporated associations than it does on corporations and unions.

Id. at 2724 (first emphasis added).

The restrictions imposed on the political activity of most veterans' organizations show that Congress has consistently responded to any perceived 'impurity' in the philanthropic purposes of those organizations.[51] The fact that it has chosen to do so by means other than an amendment to the Tax Code does not lessen the respect we owe its judgment. Congress is free not only to take "one step at a time" in solving a perceived problem, but also to choose different forms of solutions to such problems. "That first amendment interests are implicated should begin, not end our inquiry." *Citizens Against Rent Control v. City of Berkeley*, 102 S. Ct. 434, 444 (1981) (White, J., dissenting). As the Court stated in *California Medical Association*, even within the area of regu-

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[51] I fail to see the relevance to the lobbying restriction here under scrutiny of the majority's assertion that one veteran's organization "endorsed a presidential candidate in the 1980 election." Maj. op. 16 n.15. In actuality, it appears from the cited news source that it was a *Political Action Committee* formed by members of a veteran's organization that made the endorsement. (Wash. Post. Jan. 17, 1980). *See* N.Y. Times, Aug. 9, 1980, at 6 (*"To avoid risking its tax-exempt status*, the V.F.W. last year created a separate political action committee to back candidates." (emphasis added)). In view of the various restrictions imposed upon such committees, both under the Federal Election Campaign Act, *e.g.*, 2 U.S.C. § 441a(a)(1)(C) (1976) *and under the Tax Code itself, see* 26 U.S.C. § 527, the majority's comment is of no moment. Indeed, the restrictions imposed upon political committees go further to demonstrate the close attention given these concerns by Congress.

lations touching on protected speech, Congress may determine "that these entities have *differing structures and purposes*, and that they therefore may require different forms of regulation in order to protect the integrity of the electoral process." 101 S. Ct. at 2724 (emphasis added).

IV.

There is unanimous agreement that the lobbying restriction in section 501(c)(3) does not impose an unconstitutional burden upon the exercise of Taxation's first amendment rights. The majority holds, however, that by not imposing upon veterans' organizations an identical restriction—the threat of losing their tax benefits under the Internal Revenue Code—Congress unconstitutionally discriminated against Taxation.

In my opinion, that holding fails to accord Congress the respect it is due, even in areas where regulation may place an indirect burden on first amendment interests, when legislating to insure that the public interest is best served. To the extent it ignores the fact that Congress has used means besides the tax system to regulate the otherwise fully protected political activity of veterans' groups, the majority leaps peremptorily past the threshold question of whether section 501(c)(3) groups are in fact discriminated against *at all*. *California Medical Association v. FEC*, *supra*. To the extent that it fails to take cognizance of the gradual development of the law governing political activity by exempt organizations which began with the passage of the lobbying restriction in 1934 *and which continues into the present*[52]—with explicit solicitude for the first amendment interest at stake—the majority fails to afford Congress the respect due it in this field of endeavor. *Buckley v. Valeo*, *supra*.

Veterans' organizations are essentially different in character from other charitable and educational groups.

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[52] *See* 33-34 *supra*.

They are particularly distinguishable from organizations like Taxation that are avowedly incorporated and operated chiefly or exclusively for the purpose of lobbying Congress on matters of public finance. Congress, in any event, was clearly justified in drawing that distinction, and in treating what it perceived to be abuses of the tax laws as it has here. Section 501(c)(3) accomplishes that objective in a wholly content-neutral way, and is therefore consistent with the constraints of the first amendment.

While the majority attributes the system of regulation here challenged to simple congressional "inadvertence," maj. op. at 33, I would afford it the respect dictated by *Buckley* and counseled by a long and sorry history of judicial forays into the legislative province. Here, Congress has treated veterans' groups differently from the vast undifferentiated mass of organizations claiming educational and charitable purposes. It has recognized that veterans' groups are unique entities having "differing structures and differing purposes, and that they therefore may require different forms of regulation . . ." *California Medical Association, supra*, 101 S. Ct. at 2724. Nothing in the majority opinion is persuasive either of the incorrectness of that conclusion or of Congress' lack of authority to legislate on the basis of it.

I therefore respectfully dissent. Judges Robb and Wilkey join herein.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

No. 79-1464

TAXATION WITH REPRESENTATION OF WASHINGTON,
Appellant

v.

DONALD T. REGAN, SECRETARY OF THE TREASURY, *et al.*,
Appellees

MOTION OF THE AMERICAN LEGION TO INTERVENE AND FOR EXPEDITIOUS DETERMINATION OF THIS MOTION

Introduction and Statement of the Case

In an *en banc* decision issued March 26, 1982, this Court held that the equal protection requirements of the Fifth Amendment were violated by congressional and Internal Revenue Service decisions to permit veterans' organizations to receive tax deductible contributions without regard to their lobbying activities while imposing lobbying limits on other nonprofit groups, specifically, those recognized as public charities under § 501(c)(3) of the Internal Revenue Code, as a condition to the latter group of organizations being eligible to receive tax deductible contributions. Although this case was brought under § 7428 of the Internal Revenue Code simply as a challenge by Taxation With Representation of Washington ("TWRW") to the Service's denial of its application for 501(c)(3)

status, this Court suggested that on remand the District Court consider curing the unconstitutional discrimination it found by ordering new lobbying restrictions to be imposed on veterans' organizations such as The American Legion. The Court, recognizing that neither The American Legion—to which its opinion specifically referred—or any other veterans' organization had participated in any way in this case up through the time of this decision, specifically directed the District Court to invite the participation of such groups.

On April 23, 1982, the United States filed a Notice of Appeal to the United States Supreme Court.[1] Since it now appears that the Supreme Court will rule on this matter prior to proceedings on remand in the District Court, it is both necessary and appropriate that veterans' organizations—and specifically The American Legion—be permitted to intervene at this time in order to participate as parties in the Supreme Court's adjudication of this matter. If the instant motion is granted, the American Legion would be deemed a party to the Government's appeal in the Supreme Court and would have the right, as a party-appellee, to file briefs in support of jurisdiction, reply brief, merits briefs or to file a cross-appeal in the Supreme Court. *See generally*, Supreme Court Rule 10.[2] Accordingly, The American Legion moves this Court to permit it to intervene in this case as a party in order to participate in the Supreme Court's disposition of the Government's pending appeal, and to ensure that the interests of The American Legion and its more than 2,400,000 members are adequately represented in any subsequent proceedings herein.

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[1] Also on that date, two other veterans' organizations, The Disabled American Veterans and The Paralyzed Veterans of America, jointly moved to intervene in the case to file their own appeal to the United States Supreme Court.

[2] An intervening party would also appear to have the right to file a petition for certiorari within the ninety-day time period prescribed by law. 28 U.S.C. §§ 1254, 2101(c).

As set forth in the accompanying Affidavit of Bertram G. Davis, The American Legion is a veterans' organization chartered by specific act of Congress. 36 U.S.C. § 41 *et seq.* The American Legion is exempt from federal income taxation under § 501(c)(19) of the Internal Revenue Code of 1954 as amended, 26 U.S.C. § 501(c)(19), and contributions to The American Legion are deductible for income tax purposes under § 170 and for gift and estate tax purposes under §§ 2522, 2055 of the Code.

The American Legion is the largest single organization of veterans in the United States. In addition to its 2,400,000 members, The American Legion is made up of 15,800 posts located in states across the country and in eight foreign countries. The American Legion has a legislative office in Washington, D. C. and a legislative program relating to specified issues of direct interest or benefit to its members. In addition, The American Legion receives a small proportion of its income from deductible bequests or contributions.

As this Court itself recognized, veterans' organizations are "directly affected parties" who should be invited to participate in the litigation. Slip. Op. at 60. As we will show below, The American Legion's Motion to Intervene is timely and otherwise meets the criteria previously articulated for granting a post-judgment motion to intervene.

ARGUMENT

It has long been established that motions to intervene may be permitted even after the entry of a final judgment. *International Union, Local 283 v. Scofield*, 382 U.S. 205 (1965); *Wolpe v. Poretsky*, 144 F.2d 505, 508 (D.C. Cir.), *cert. denied* 323 U.S. 777 (1944). In *Scofield*, the Supreme Court suggested that, in evaluating motions to intervene after judgment, the appellate courts should be guided by the policies expressed in Rule 24 of

the Federal Rules of Civil Procedure. 382 U.S. at 217 n.10.

In view of the unusual posture of this case, The American Legion submits that its right to intervene at this stage could not be more apparent. Whether the Court were to apply the standards of Rule 24(b), relating to permissive intervention when an applicant's "claim or defense and the main action have a question of law or fact in common," or those of Rule 24(a), permitting intervention as a matter of right when the applicant claims "an interest relating to the property or transaction which is the subject of the action and he is so situated that disposition of the action may as a practical matter impair or impede his ability to protect that interest," The American Legion's right to participate in this case henceforth cannot be subject to question.

A. *The American Legion's Interests and Those of Its Members and Benefactors Are Plainly Affected By This Decision and Thus Meet the Criteria of Both Fed. R. Civ. P. 24(a) and (b)*

In its *en banc* decision, this Court itself recognized that its ruling vitally affected the interests of veterans' groups and that, without their participation, those interests might as a practical matter be impaired. *See generally*, slip op. at 59. If the District Court were to follow this Court's view as to the "most logical" remedy and the one "most in accordance with the judgments expressed by Congress," *id.*, it would apparently in some way impose lobbying restrictions upon veterans' organizations. These restrictions would directly and substantially modify The American Legion's current legal status and subject it to question by the Internal Revenue Service for activities which it had heretofore conducted free of government regulation. Moreover, if the Supreme Court were to affirm the Court of Appeals' conclusion that an appropriate remedy for the perceived unconstitu-

tionality would be to judicially impose restrictions on veterans' groups, it is plain that The American Legion's efforts to preserve its current tax status and freedom from restraint as to lobbying would, as a practical matter, be seriously impaired. *See, Foster v. Gueory*, 655 F.2d 1319, 1324-25 (D.C. Cir. 1981). *Cf. Ionian Shipping Co. v. British Law Insurance Co.*, 426 F.2d 186, 191 (2d Cir. 1970) (intervention of right appropriate when novel issues to be determined would be given *stare decisis* effect); *Atlantis Development Corp. v. United States*, 379 F.2d 818 (5th Cir. 1967) (to same effect).

Not only are the requirements of Rule 24(a)(2) thus met, but The American Legion's position—that the current tax treatment that it enjoys is wholly constitutional and should not be modified by the judiciary—also plainly raises questions common to those already at issue in this litigation and thus meets the requirements of Rule 24(b)(2). This Court's decision, in short, vitally and directly affects the interests of the American Legion and its members in such a degree that their participation as intervenors is plainly appropriate.[3]

B. *Existing Parties Do Not Adequately Represent This Intervenor's Interests*

The second criteria of Rule 24(a)(2)—that the Intervenors' interest not be "adequately represented by existing parties"—is also met here.[4] While the Government has filed a notice of appeal, it is readily apparent that

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[3] Indeed, The American Legion's interest in participating in this case henceforth as a party is particularly great since this Court appeared to make findings about its specific lobbying activities on the basis of no factual record whatsoever and without hearing first from The American Legion. *See* slip op. at 12-13.

[4] TWRW cannot be regarded as an adequate representative since it is as a result of TWRW's challenge to the current tax scheme that the American Legion now stands to be adversely affected.

the Government's interests do "not dictate precisely the same approach to the conduct of the litigation" as do The American Legion's. *Trbovich v. United States Workers of America*, 404 U.S. 528, 539 (1972). While the Government presumably has an interest in defending the constitutionality of the current statutory scheme, its interests with regard to the appropriate remedy and those of a veterans' organization such as The American Legion are not necessarily coextensive: The Government might conclude, in accordance with the thrust of the majority's opinion, that if a remedy is required, it would be better to impose restrictions on veterans' organizations than to strike down current lobbying restrictions on § 501(c)(3) organizations. The American Legion is of the view that, if the current scheme is unconstitutional, the only appropriate remedy is to strike down the lobbying restrictions of § 501(c)(3). This factor alone is sufficient to satisfy the "minimal burden" of showing possible inadequacy of representation by the public official defendants for purposes of the policy concern represented by Rule 24(a)(2). *See, Foster v. Gueory, supra*, 655 F.2d at 1325; *National Farm Lines v. ICC*, 564 F.2d 381, 383-84 (10th Cir. 1977); *Hodgson v. United Mine Workers of America*, 473 F.2d 118, 130, 153 U.S. App. D.C. 407 (1972). *See also, Atlantic Refining Co. v. Standard Oil Co.*, 304 F.2d 387, 113 U.S. App. D.C. 50 (1962); cf. *New York Public Interest Research Group v. Regents of The State of New York*, 516 F.2d 350, 352 (2d Cir. 1976).[5]

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[5] Since the pending motions to intervene of The Paralyzed Veterans of America and Disabled American Veterans have not yet been granted, The American Legion does not believe that they are "existing parties" for purposes of this criteria. Even if they were, however, The American Legion—as the largest veterans' organization in the United States, and as an organization to which this Court specifically referred—has a plain interest in independently participating in this proceeding as a party hereinafter regardless of the participation of The Disabled Veterans and Paralyzed Veterans of America.

C. *This Motion to Intervene Is Timely*

Finally, Rule 24 requires that motions to intervene be "timely." The Supreme Court and this Circuit have long recognized that in determining the timeliness of a motion to intervene after judgment for the purpose of participating in or initiating an appeal, "[t]he critical inquiry in every such case is whether in view of all the circumstances the intervenor acted promptly after the entry of final judgment." *United Airlines, Inc. v. McDonald*, 432 U.S. 385, 395-96 (1977); *Wolpe v. Poretsky, supra*, 144 F.2d at 508. This Court has elaborated Rule 24's timeliness requirement, noting that "the amount of time which has elapsed . . . is not in itself the determinative test of timeliness. Rather, the courts should also look to the related circumstances, including the purpose for which intervention is sought, the necessity for intervention as a means of preserving the applicant's rights, and the improbability of prejudice to those already parties in the case." *Hodgson v. United Mine Workers, supra*, 473 F.2d at 129. All of these criteria favor granting this intervention motion.

To begin with, The American Legion's motion is filed well within the time permitted the Government to docket its appeal in the Supreme Court and thus well before any brief by The American Legion as a party to this appeal would be due.[6] Grant of this motion would therefore in no way prejudice the speedy and timely disposition of this appeal in the Supreme Court.[7]

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[6] Pursuant to 28 U.S.C. §§ 1252, 2101(a), and Supreme Court Rule 12, the Government's appeal will not be deemed docketed until, within 60 days from the filing the notice, the Government files its jurisdictional statement.

[7] This motion is also filed well within the time period within which a petition for certiorari could be timely filed, which period expires within two-to three days of when the Government's appeal must be docketed. *See* 28 U.S.C. § 2101(c).

Moreover, as set forth in the attached Affidavit of Bertram G. Davis, The American Legion had no knowledge that its tax status—and specifically, its freedom from lobbying restrictions or the validity of donors' deductibility of contributions to it—might be adversely affected by this litigation until after the announcement of the decision of this *en banc* Court on March 26, 1982. The American Legion did not obtain a copy of the Court's decision until several days after it issued, and therefore concluded that, since the Court of Appeals had directed a remand in which veterans' organizations would be invited to participate in framing the remedy, it would participate in the remedial proceedings before the District Court to seek to avoid any adverse effect upon its own status. Davis Affidavit, ¶ 9. As soon as The American Legion learned that the Government had filed a notice of appeal on Friday, April 23, thereby invoking the Supreme Court's mandatory appellate jurisdiction, The American Legion acted promptly to protect its interests. *Id.* at ¶ 10. On Tuesday, April 27, undersigned counsel was retained to represent The American Legion in these appellate proceedings, and this motion is being filed 3 days later. Thus, the Motion to Intervene is timely, meets all other applicable requirements, and should be granted.[8]

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[8] Although a Notice of Appeal has been filed, applicant submits that this Court may rule on this and other pending motions for intervention. First, this motion is supplementary to the main judgment. *See United States v. 329.22 Acres of Land, etc.*, 307 F. Supp. 34, 52 (M.D. Fla. 1968), *aff'd*, 418 F.2d 551, 558 (5th Cir. 1969) (district court rejects claim that pendency of notice of appeal precludes its consideration of supplementary motion). Moreover, the Supreme Court rules expressly contemplate that, until an appeal is *docketed*, motions to dismiss the appeal may be filed in and acted upon by the court from which the appeal is taken, Supreme Court Rule 14.1, 14.2, indicating that the mere filing of the Notice does not deprive the lower court of all jurisdiction. *See also, Benson v. Beens*, 456 F.2d 244 (8th Cir. 1972) (district court denied intervention motions filed and ruled on after Notice

Finally, The American Legion submits that all other equitable considerations favor the granting of this motion. Its participation as an intervenor will not prejudice any existing party nor will its intervention delay the proceedings since The American Legion will meet all applicable time limits for the filing of papers that apply to the Government or appellees. Undersigned counsel has sought consent of all existing parties, and is authorized to represent to this Court that plaintiff TWRW will file no objection to this motion and that the Government is considering what position to take with regard to this intervenor.

The American Legion respectfully requests expedited consideration of this motion. If intervention is denied in this Court, The American Legion presently intends to seek intervention directly in the United States Supreme Court. The ascertainment of the applicable time periods for the filing of papers in the Supreme Court, including both intervention papers and briefs (whether as a party or amicus), are dependent upon whether its motion to intervene is granted. For all the reasons set forth above,

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of Appeal to Supreme Court was filed prior to docketing; Court of Appeals holds, after docketing of appeal in Supreme Court, that it lacks jurisdiction over appeal from district court denial of intervention motion). *Cf. Schempp v. School District of Abington Twsp, Pa.*, 184 F. Supp. 381 (E.D. Pa. 1960) (three-judge court lacked jurisdiction to decide 60(b) motion to vacate judgment from which Notice of Appeal to Supreme Court had been filed and record had been certified to Supreme Court). It is true that in *Hobson v. Hansen*, 44 F.R.D. 18 (D.D.C. 1968), Judge Skelly Wright, sitting by designation, held that once a Notice of Appeal had been filed to the Court of Appeals, the District Court lacked jurisdiction to rule on motions to intervene filed thereafter. However, appeals from district courts to courts of appeals are docketed virtually immediately after the notice is filed in the district court, *see* Fed. R. App. P. 12(a) (clerk of court of appeals dockets appeal upon receipt of notice from district court), *Id.* 3(d) (clerk of district court must transmit "forthwith" to court of appeals copy of notice of appeal), in contrast to practice in the Supreme Court.

The American Legion respectfully submits that its interests are so vitally implicated by this Court's decision that it must be granted status as an intervenor.

CONCLUSION

For all the foregoing reasons, The American Legion respectfully requests that this Court act expeditiously to grant this Motion to Intervene.

Respectfully submitted,

/s/ Mitchell Rogovin
MITCHELL ROGOVIN
GEORGE T. FRAMPTON, JR.
VICKI C. JACKSON
ROGOVIN, HUGE & LENZNER
A Professional Corporation
1730 Rhode Island Avenue, N.W.
Washington, D.C. 20036
(202) 466-6464
Counsel for The American Legion

Of Counsel:

Bertram G. Davis, Esquire
700 North Pennsylvania Street
Indianapolis, Indiana 46206

Samuel C. Borzilleri, Esquire
888 17th Street, N.W.
Washington, D.C. 20006

Dated: April 30, 1982

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA

No. 79-1464

TAXATION WITH REPRESENTATION OF WASHINGTON,
Appellant

v.

DONALD T. REGAN, SECRETARY OF THE TREASURY, *et al.*,
Appellees

AFFIDAVIT OF BERTRAM G. DAVIS

I, BERTRAM G. DAVIS, Esq., being duly sworn, depose and say as follows:

1. I am the National Judge Advocate of The American Legion and submit this affidavit in support of The American Legion and submit this affidavit in support of The American Legion's motion to intervene in the above-captioned case.

2. As National Judge Advocate of The American Legion, I have served as the organization's chief legal officer since 1960.

3. The American Legion, with over 2.4 million members, is the largest veterans' organization in the world. It has departments in 50 states, eight foreign countries and over 15,800 local posts.

4. The American Legion is a non-political, civilian organization originally chartered by Act of Congress on September 16, 1919, 36 U.S.C. §§ 41-51 (1981 Cum. An. Pocket Part).

5. Membership in The American Legion is limited to wartime veterans who served in World War I, II, the Korean Conflict or the Vietnam War.

6. From its inception until 1973, The American Legion had been exempt from federal income taxation under section 501(c)(4), IRS 1954 or its predecessor provisions. In 1973 The American Legion opted to be considered for and was determined to be exempt under § 501(c)(19), the then newly enacted provision relating exclusively to veterans' organizations. Contributions and bequests to The American Legion are and have been deductible from federal income, as are estate and gift taxes, since the organization's inception. Attached as Exhibit A are copies of exemption letters from the IRS reflecting the deductibility of contributions to The American Legion and the organization's tax exempt status as stated above.

7. Of the $22 million total budget of The American Legion for 1982, approximately $300,000 will be expended for legislative activity. The bulk of that sum will be spent to maintain an office in Washington for four legislative specialists.

8. The Legislative Program of The American Legion is a reflection of the mandates adopted at its annual National Conventions. Under Article V, Section 1 of the Legion's National Constitution, its legislative body is its National Convention.

9. On March 26, 1982, I first learned of the instant litigation when asked for a press comment regarding the en banc decision of the Court of Appeals. I called our Washigton, D.C. office to obtain a copy of the opinion which I received three or four days later. Since the majority reversed and remanded the case to the District Court "with the instruction that it cure the constitutionally invalid operation of Section 501(c) after inviting veterans' organizations to participate in framing the

relief," I advised American Legion officials that we could intervene, as suggested by the Court, at the trial level.

10. On April 22, 1982, I learned that the Government intended to appeal the Court of Appeals decision to the U.S. Supreme Court. Upon learning of this development, I sought authority from the National Commander to retain Washington counsel and, on April 27, 1982 met with and retained our counsel for this proceeding in which we seek to intervene.

11. To the best of my knowledge and belief, no other official of The American Legion was aware of this pending litigation prior to my learning of it as described in Paragraph 9 above.

Further deponent sayeth not.

/s/ Bertram G. Davis
BERTRAM G. DAVIS

Sworn to and Suscribed before me this 30th day of April.

/s/ Beth L. Fowler
BETH L. FOWLER
Notary Public
My Commission Expires
February 14, 1984

[SEAL]

TREASURY DEPARTMENT
Washington 25

Office of
Commissioner of Internal Revenue
Address Reply To
Commissioner of Internal Revenue
And Refer To

IT:P:T:1
MAP

Mar. 14, 1946

The American Legion
c/o Donald G. Glascoff,
National Adjutant
National Headquarters
Indianapolis 6, Indiana

Gentlemen:

Reference is made to the information submitted for use in determining the status of the departments and posts under your jurisdiction for Federal income tax purposes.

In Bureau ruling dated February 26, 1934 it was held that you are entitled to exemption from Federal income tax under the provisions of section 103(8) of the Revenue Act of 1932 and corresponding provisions of prior revenue acts. Such ruling was affirmed July 8, 1938 under the Revenue Act of 1936 and is applicable under the provisions of section 101(8) of the Revenue Act of 1938 and the Internal Revenue Code.

Based upon the evidence presented, it is held that your departments and posts appearing on the lists submitted with an affidavit dated February 27, 1946 of your National Adjutant are entitled to exemption from Federal income tax under the provisions of section 101(8) of the Internal Revenue Code and corresponding provisions of prior revenue acts.

Accordingly, your departments and posts appearing on the lists submitted will not be required to file income tax returns unless there is a change in their character, purposes or method of operation. Any such changes should be reported immediately to this Bureau in order that their effect upon the exempt status of the departments and posts under your jurisdiction may be determined.

You should furnish the Bureau annually, on the calendar year basis, lists in quadruplicate showing only the names, numbers and addresses of any new departments and posts which were chartered by you during the calendar year and the name, numbers and addresses of any departments and posts which for any reason have ceased to exist. Such annual lists should be accompanied by a statement sworn to by one of your principal officers as to whether the information heretofore submitted by you and on which this ruling is based is applicable in all respects to the departments and posts appearing on the lists and should be forwarded so as to reach this office not later than February 15 of the following year.

Contributions made to you and your departments and posts are deductible by the donors in arriving at their taxable net income in the manner and to the extent provided by section 23(o) and (q) of the Internal Revenue Code, as amended.

However, under section 54(f), as added to the Internal Revenue Code by section 117 of the Revenue Act of 1943, you and your departments and posts are required to file annually information returns on Form 990 (Revised May 1944) with the collector of internal revenue for the respective districts in which located so long as the exemption remains in effect. This form may be obtained from the collector and is required to be filed on or before the fifteenth day of the fifth month following the close of the respective annual accounting periods. Your departments may file annually in addition to a separate annual return,

a group return on Form 990 for two or more of the local posts which are affiliated with such department. Group returns on Form 990 shall be filed in accordance with the regulations promulgated under the income tax chapter of the Internal Revenue Code and the instructions on Form 990 and shall be considered the return of each of the local posts included therein.

The collectors of internal revenue for the districts in which you and your departments and posts are located are being advised of this action.

By direction of the Commissioner.

Very truly yours,

/s/ E. J. McLARNEY
Acting Deputy Commissioner

[SEAL]

TREASURY DEPARTMENT
Washington

Office of
Commissioner of Internal Revenue
Address Reply To
Commissioner of Internal Revenue
And Refer To

February 26, 1934.

IT:E:RR
WRC

The American Legion,
National Headquarters,
Indianapolis, Indiana

Attention: Remster A. Bingham,
National Judge Advocate.

Sirs:

Reference is made to the evidence submitted by you to be considered in determining your status for Federal income tax purposes.

An examination of the evidence submitted discloses that you were incorporated by a special act of Congress, approved September 16, 1919. Your purposes are stated in the act as follows:

> "Sec. 3. That the purposes of this corporation shall be: To promote peace and good will among the peoples of the United States and all the nations of the earth; to preserve the memories and incidents of the Great War of 1917-1918; to cement the ties of love and comradeship born of service; and to consecrate the efforts of its members to mutual helpfulness and service to their country."

Membership in your organization is limited by Section 5 of the Act of Congress to persons serving in the Naval or Military Service of the United States at some time during the period between April 6, 1917 to November 11, 1918, both dates inclusive. Your actual activities are consistent with your purposes. Your income is used to carry out your purposes, no part inuring to the benefit of any private shareholder or individual.

In view of the foregoing, it is held that you come within the exemption provisions of section 103(8) of the Revenue Act of 1932 and similar provisions of prior revenue codes. You will accordingly be relieved of the duty of filing returns of annual income so long as your purposes and actual activities remain unchanged. Any changes however, in your purposes or actual activities must be reported by you immediately to the collector of internal revenue for your district in order that the effect of such changes upon your present exempt status may be determined.

The exemption referred to in this letter does not apply to taxes levied under other titles or provisions of the Revenue Act of 1932 or similar provisions of prior revenue acts except in so far as the exemption is granted expressly under those provisions to corporations enumerated in section 103.

Since you are an organization of war veterans it follows that contributions made to your organization by individuals are deductible for Federal income tax purposes in the manner and to the extent provided in section 23(n)(4) of the Revenue Act of 1932 and similar provisions of prior revenue acts.

A copy of this ruling is being furnished the collector of internal revenue, Indianapolis, Indiana.

Section 213(a) of the National Industrial Recovery Act of June 16, 1933 imposes a five per cent excise tax upon the receipt of dividends required to be included in the gross income of the recipient under the Revenue Act of

1932) by any person other than a domestic corporation. The record in your case discloses that you are a domestic corporation. Form 1043A must be used in disclosing actual ownership of stock by domestic corporations and to establish nonliability to withholding the tax at the source of dividends. Therefore, in order for you to secure relief from the deduction and withholding of the five per cent excise tax it will be necessary for you to file form 1043A with each payor corporation, notwithstanding the fact that you have been held exempt under section 103 of the Revenue Act of 1932.

By direction of the Commissioner.

Respectfully,

/s/ Chas. T. Russell
Deputy Commissioner.

Mar 26, 1973 T:MS:EO:R:1
The American Legion
National Headquarters
Indianapolis, Indiana 46206

EIN 35-0144250
DO 52

Gentlemen:

This refers to your letter dated January 2, 1973, in which you ask that your ruling letter of March 14, 1946, be modified to show that you are recognized to be exempt from Federal income tax under section 501(c)(19) of the Internal Revenue Code. You state, and the information furnished shows, that membership in your organization is limited to persons who served in the Armed Services of the United States during a period of war.

Our records show that on March 14, 1946, you and your subordinated departments and posts were recognized to be exempt from Federal income tax under section 101(8) of the 1939 Code (this now corresponds to section 501(c)(4) of the 1954 Code).

Based on the information furnished, we rule that you and your subordinate departments and posts are recognized as being exempt under section 501(c)(19) of the Code.

You are required to file the annual return, Form 990, on or before the 15th day of the 5th month after the end of your annual accounting period if your annual gross receipts are normally more than $5,000. Failure to file the Form 990 by this date may subject you to a penalty of $10 for each day during which such failure continues, up to a maximum of $5,000. Your subordinates will have to file an annual information return, Form 990, if their gross receipts in each taxable year are normally more than $5,000. If you do not include the subordinates in a group

return, each must file an annual return by the 15th day of the 5th month after its annual accounting period closes.

You and your subordinates are not required to file Federal income tax returns unless you or your subordinates are subject to the tax on unrelated business income under section 511 of the Code, if so, you and your subordinates must file an income tax return on Form 990-T. In this letter we are not determining whether any of your, or your subordinates' present or proposed activities is unrelated trade or business as defined in section 513 of the Code.

Unless specifically excepted, you and your subordinates are liable for taxes under the Federal Insurance Contributions Act (social security taxes). Also, unless excepted, you and your subordinates are liable for tax under the Federal Unemployment Tax Act if, during the current or preceding calendar year, you have one or more employees at any time in each of 20 weeks, or you pay wages of $1,500 or more in any calendar quarter. Any questions concerning excise, employment, or other Federal taxes should be submitted to your key District Director in Baltimore, Maryland.

Contributions made to your exempt subordinate units are deductible as provided by section 170 of the Code.

You should advise each of the subordinates of the provisions of this ruling, including the requirement for filing information or other returns.

Each year within 45 days after the close of your annual accounting period, please send the following to the Philadelphia Service Center, 11601 Roosevelt Boulevard, Philadelphia, Pennsylvania 19155, Attention: EOR Branch:

1. A statement describing any changes during the year in the purposes, character, or method of operation of your subordinates.

2. A list of the names, mailing addresses including ZIP Codes, and employer identification numbers (if required for group exemption letter purposes) of subordinates on your group exemption roster that during the year:

   a. changed names or addresses;

   b. were deleted from the roster;

   c. were added to the roster.

   An annotated directory of subordinates will not be accepted for this purpose.

3. For subordinates added to the roster, a letter signed by one of your principal officers containing or attaching:

   a. a statement that the information which your present group exemption letter is based applies to the new subordinates;

   b. a statement that each has given you written authorization to add its name to the roster;

   c. a list of those to which the Service previously issued ruling or determination letters relating to exemption.

4. If applicable, a statement that your group exemption roster did not change during the year.

To the extent that this ruling is inconsistent with it this ruling modifies our ruling issued to you on March 14, 1946.

Your key District Director is being advised of this action.

Sincerely yours,

/s/ [Illegible]
Director,
Miscellaneous and Special
Provisions Tax Division

CERTIFICATE OF SERVICE

I hereby certify that the foregoing Motions of The American Legion to Intervene and for Expeditious Determination of This Motion has been served on Appellee and Appellant, and on other applicants for intervention, by mailing a copy thereof, first-class postage prepaid to:

Rex E. Lee, Solicitor General of the United States
Room 5614
Department of Justice
Washington, D.C. 20530
(Counsel for Government-Appellees)

John C. Sims, Esq.
Suite 700
2000 P Street, N.W.
Washington, D.C. 20036
(Counsel for Taxation With Representation of Washington)

Joseph C. Zengerle, Esq.
Bingham, Danna & Gould
1724 Massachusetts Avenue, N.W.
Suit 400
Washington, D.C. 20036
(Counsel for Disabled American Veterans and Paralyzed Veterans of America).

/s/ Mitchell Rogovin
MITCHELL ROGOVIN

Dated: April 30, 1982

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 79-1464

TAXATION WITH REPRESENTATION OF WASHINGTON,
Plaintiff-Appellant
v.
DONALD T. REGAN, SECRETARY OF THE TREASURY, *et al.*,
Defendants-Appellees

MEMORANDUM IN OPPOSITION TO MOTIONS FOR INTERVENTION

This memorandum is in response to the motions to intervene filed in the above-captioned case on behalf of the Disabled American Veterans and Paralyzed Veterans of America, the American Legion, and the Veterans of Foreign Wars of the United States.

The Secretary of the Treasury, the Commissioner of Internal Revenue, and the United States, appellees in this case, oppose the motions for intervention. Although the policies underlying intervention in the district courts may be applicable to attempts to intervene at the appellate level (see *Auto Workers* v. *Scofield*, 382 U.S. 205, 216-217 (1965)), the courts of appeals have recognized that intervention in an appeal, where none has been sought in the lower court, should be permitted only in exceptional circumstances and for imperative reasons. *In re Grand Jury Investigation*, 587 F. 2d 598, 601 (3d Cir. 1978); *McKenna* v. *Pan Am. Petroleum Corp.*, 303 F. 2d 778 (5th Cir. 1962). None of the motions here cites an imperative ground that would justify intervention at this advanced stage of the appellate proceedings—at the time or after the government filed a notice of appeal to the Supreme Court to review this Court's *en banc* decision, and more than a year after the entry of the opinions of a panel of this Court. The interests of the applicants for intervention, and other veterans'

organizations, will be adequately represented before the Supreme Court by the United States. The government will urge that the Supreme Court sustain the constitutionality of the provisions of the Internal Revenue Code which grant to veterans' organizations, and others, exemption from federal tax and the right to receive tax-deductible contributions. To protect their interests in the litigation, veterans' groups may, of course, file briefs as *amici curiae*, as may other interested groups, including charitable organizations that engage in substantial lobbying or that would engage in substantial lobbying if the restrictions in the Internal Revenue Code were finally declared invalid. The government would consent to such filings by veterans' groups. If they find that they are unduly hampered by the page limitations applicable to *amici curiae*, they are free to ask the Supreme Court for permission to file briefs in excess of those limitations.

Moreover, the granting of the motions for intervention would establish a precedent which may well adversely affect the litigation of tax disputes in future cases. Many tax cases may have a bearing on the tax status or liabilities of taxpayers who are not parties to the litigation. Allowance of intervention by such taxpayers would unduly complicate and delay the resolution of tax disputes between the Internal Revenue Service and the taxpayer *sub judice*.

This point carries particular force in proceedings such as this under Section 7428 of the Internal Revenue Code. Congress enacted that statute for the limited purpose of providing prompt judicial review of Internal Revenue Service determinations with respect to specified exempt organization issues, including the initial or continuing qualification of an organization for exemption under Secton 501(c)(3) of the Code. H.R. Rep. No. 94-658, 94th Cong., 1st Sess. 282, 286; S. Rep. No. 94-938, 94th Cong., 2d Sess. 585, 588. It contemplated that in most cases there would be no need for factual development and that the facts as presented to the court would be con-

fined to the administrative record developed before the Internal Revenue Service. H.R. Rep. No. 94-658, *supra*, at 286 n.7; S. Rep. No. 94-938, *supra*, 588, n.7.* By the same token, while Congress was aware that in certain circumstances third parties had been allowed to litigate the exempt status of other organizations, it specifically refrained from sanctioning the use of Section 7428 for that purpose. See Section 7428(b)(1) and (b)(2); H.R. Rep. No. 94-658, *supra*, at 284 & n.6; S. Rep. No. 94-938, *supra*, at 587 & n.6. Accordingly, the intervention now sought by veterans' groups would expand this proceeding beyond its appropriate procedural confines. See *NAACP* v. *New York*, 413 U.S. 345, 368 (1973).

CONCLUSION

The motions for intervention should be denied.

Respectfully submitted,

/s/ Glenn L. Archer, Jr.
GLENN L. ARCHER, JR.
Assistant Attorney General
Tax Division
Department of Justice
Washington, D.C. 20530
Telephone: (202) 633-3361
Counsel for Appellees

Dated: This 14th day of May, 1982.

---

* This limitation has been strictly observed by the courts in cases such as this involving the initial qualification of an organization for Section 501(c)(3) status. *Houston Lawyer Referral Service* v. *Commissioner*, 69 T.C. 570 (1978); *Animal Protection Institute, Inc.* v. *United States*, 42 A.F.T.R. 2d 5850 (Ct. Cl., Sept. 19, 1978); *Va. Professional Standards Review Foundation* v. *Blumenthal*, 466 F. Supp. 1164, 1167-1168 (D.C. D.C. 1979); *Southwest Va. Professional Standards Review Org., Inc.* v. *United States*, 42 A.F.T.R. 2d 6167 (D.C. D.C., Oct. 13, 1978).

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 79-1464

TAXATION WITH REPRESENTATION OF WASHINGTON,
Plaintiff-Appellant

v.

DONALD T. REGAN, SECRETARY OF THE TREASURY, *et al.*,
Defendants-Appellees

CERTIFICATE OF SERVICE

It is hereby certified that service of this memorandum for the appellees in the above-captioned case has been made upon counsel of record by mailing a copy thereof to each of them, on this 14th day of May, 1982, in envelopes (with postage prepaid) properly addressed to each of them as follows:

John Cary Sims, Esquire
Suite 700
2000 P Street, N.W.
Washington, D.C. 20036

Thomas F. Field, Esquire
6830 North Fairfax Drive
Arlington, Virginia 22213

Joseph C. Zengerle
Byron R. Trauger
Bingham, Dana & Gould
1724 Mass. Ave., N.W.
Suite 400
Washington, D.C. 20036

Sheldon S. Cohen, Esquire
Cohen and Uretz
1775 K Street, N.W.
Suite 400
Washington, D.C. 20006

Mitchell Rogovin, Esquire
Rogovin, Huge & Lenzer
1730 Rhode Island Avenue, N.W.
Washington, D.C. 20036

/s/ Michael L. Paup
MICHAEL L. PAUP
Attorney

APPENDIX D

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

No. 79-1464

TAXATION WITH REPRESENTATION OF WASHINGTON,
Appellant

v.

DONALD T. REGAN, SECRETARY OF THE TREASURY, *et al.*,
Appellees

REPLY MEMORANDUM OF THE AMERICAN LEGION IN SUPPORT OF ITS MOTION TO INTERVENE

The American Legion submits this Reply Brief in Response to the government's opposition to its intervention motion.

As argued previously, this case presents both "exceptional circumstances and imperative reasons" to permit The American Legion, as the largest veterans' organization in the country, to intervene. As a result of this Court's en banc decision, the tax status of The American Legion stands to be significantly and adversely affected. The government's conclusory claim that its representation of the Legion's interest will be "adequate" does not in any way rebut the Legion's prior showing that its interests and those of the government are not necessarily coincident, and that the government cannot be expected adequately to represent those interests. Indeed, the Government implicitly recognizes as much by indicating in

its opposition its intention to consent to the filing of amici curiae briefs by veterans' organizations.

Second, whatever may have been Congress' intention in enacting § 7428 with regard to a party's litigating the status of other organizations, in this case the unusual turn of events in this Court has created an apparently substantial possibility that the tax status of veterans' organizations, none of whom were even parties to this case, will be significantly and adversely affected. For this reason, this Court itself explicitly recognized in its opinion the need for their participation in further proceedings. The American Legion therefore submits that since the circumstances of this case are so unusual, the government's concern for establishing a precedent affecting future litigation of tax disputes is misplaced.

CONCLUSION

For the foregoing reasons, and those stated in its initial Motion, The American Legion respectfully submits that its Motion to Intervene should be granted.*

/s/ George T. Frampton, Jr.
GEORGE T. FRAMPTON, JR.
MITCHELL ROGOVIN
VICKI C. JACKSON
ROGOVIN, HUGE & LENZNER,
A Professional Corporation
1730 Rhode Island Avenue, N.W.
Washington, D.C. 20036
(202) 466-6464

Dated: May 18, 1982

---

* The American Legion does not understand the government to challenge the timeliness of its intervention motion, and relies on its discussion of that issue found in its initial Motion papers.

CERTIFICATE OF SERVICE

It is hereby certified that service of this Reply Memorandum of The American Legion in Support of Its Motion to Intervene has been made upon counsel of record by mailing a copy thereof to each of them, on this 18th day of May, 1982, first-class postage prepaid, addressed as follows:

John Cary Sims, Esquire
Suits 700
2000 P Street, N.W.
Washington, D.C. 20036

Thomas F. Field, Esquire
6830 North Fairfax Drive
Arlington, Virginia 22213

Joseph C. Zengerle, Esquire
Byron R. Trauger, Esquire
Bingham, Dana & Gould
1724 Massachusetts Avenue, N.W.
Suite 400
Washington, D.C. 20036

Sheldon S. Cohen, Esquire
Cohen and Uretz
1775 K Street, N.W.
Suite 400
Washington, D.C. 20006

Glenn L. Archer, Jr.
Assistant Attorney General
Tax Division, Department of Justice
Washington, D.C. 20530

Rex E. Lee, Solicitor General of
the United States
Room 5614
Department of Justice
Washington, D.C. 20530

/s/ Vicki C. Jackson
VICKI C. JACKSON

APPENDIX E

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

SEPTEMBER TERM, 1981

Civil Action No. 78-0834

No. 79-1464

TAXATION WITH REPRESENTATION OF WASHINGTON, *Appellant*

v.

DONALD T. REGAN, SECRETARY OF THE TREASURY, *et al.*

Before: Robinson, Chief Judge; Wright, Tamm, MacKinnon, Robb, Wilkey, Wald, Mikva, Edwards and Ginsburg, Circuit Judges

ORDER

Upon consideration of the motion of Disabled American Veterans and Paralyzed Veterans of America for leave to intervene, the motion of American Legion to intervene and for expeditious determination of this motion and corrected motion of Veterans of Foreign Wars of the United States for leave to intervene, appellees' (federal) opposition to motions for intervention, and the replies of Disabled American Veterans and Paralyzed Veterans of America and American Legion to the aforesaid opposition, it is

ORDERED, by the Court, that the aforesaid motions to intervene are denied and the Clerk is directed to note the docket accordingly.

Per Curiam
FOR THE COURT:

/s/ George A. Fisher
GEORGE A. FISHER
Clerk

81-2338

No.

Office - Supreme Court, U.S.
FILED
JUN 11 1982
ALEXANDER L. STEVAS
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1981

DONALD T. REGAN, SECRETARY OF THE TREASURY, ET AL.,
APPELLANTS,

v.

TAXATION WITH REPRESENTATION OF WASHINGTON,
APPELLEE.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Motion to Intervene, for an Extension of Time in Which to File a Jurisdictional Statement, and for Expedited Consideration Thereof

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JOSEPH C. ZENGERLE*
BYRON R. TRAUGER
BINGHAM, DANA & GOULD
1724 Massachusetts Avenue, N.W.
Washington, D.C. 20036
(202) 822-9320
Counsel for Disabled American Veterans and Paralyzed Veterans of America
*Counsel of Record

BATEMAN & SLADE, INC. BOSTON, MASSACHUSETTS

Table of Contents

Page

Table of Authorities i
Statement 2
Argument 5
I. Intervention 5
A. Statutory considerations 5
B. Fed. R. Civ. P. 24 7
1. Timeliness 7
2. Veterans' Interest 9
3. Adequacy of Representation 10
4. Common Issues 11
C. Other considerations favoring intervention 11
II. Expedition 13
III. Extension of time 14
Conclusion 15
Index to Appendix ..... follows 15

Table of Authorities

Cases

Banks v. Chicago Grain Trimmers, 389 U.S. 813 (1967) ... 10n
Consumer Energy Council of America v. FERC, Nos. 80-2184 et al. 12n
Dames & Moore v. Regan, 452 U.S. 932 (1981) 10n
Eastern-Central M.C. Assn. v. U.S., 321 U.S. 194 (1944) .. 10n
International Union, Local 283 v. Scofield, 382 U.S. 205 (1965) 6, 7, 11

Page

NAACP v. New York, 413 U.S. 345 (1973) 7, 8

NLRB v. Acme Industrial Co., 384 U.S. 925 (1966) 10n

NLRB v. Baptist Hospital, Inc., 440 U.S. 943 (1979) 10n

Taxation with Representation of Washington v. Blumenthal, 79-1 CCH U.S.T.C. ¶ 9185, 43 AFTR 2d 79-679 (D.D.C. Jan. 31, 1979) 2

Taxation with Representation of Washington v. Regan, 82-1 CCH U.S.T.C. ¶ 9272, 49 AFTR 2d 82-961 (D.C. Cir. Mar. 26, 1982) 2, 3, 4, 9n, 10

Trbovich v. UMW, 404 U.S. 528 (1972) 11

United Airlines, Inc. v. McDonald, 432 U.S. 385 (1977) 8

U.S. v. Terminal R.R. Assn., 236 U.S. 194 (1915) 10n

STATUTES

28 U.S.C. § 1252 .....8, 13

28 U.S.C. § 2101 .....8, 13

36 U.S.C. §§ 90c and 1153 .....10n

36 U.S.C. §§ 90f and 1156 .....10n

Internal Revenue Code of 1954, as amended, 26 U.S.C.:

§ 170(c) 4

§ 170(c)(3) 9, 10

§ 501(c) 3, 4, 9, 10

§ 501(c)(3) 2, 3

§ 501(c)(4) 4, 9, 9n

§ 501(c)(19) 9

§ 7428 .....2, 5, 6, 7

Tax Reform Act of 1976, Pub.L.No. 94-455 6

Page

Rules

Federal Rule of Appellate Procedure 4(a) 8
Federal Rules of Civil Procedure:
24 .....5, 7
24(a)(2) 9
24(b)(2) 11
Supreme Court Rules:
11.2 8
12.1 13
12.2 14
15.3 12
16.1 14
16.5 12
28.1 .....5n
29.2 14
34.3 12
34.4 12
36.1 .....12, 14
36.2 12
42.2(b) 14
42.4 13

Other Authorities

IRS Publication No. 78, Cumulative List of Organizations Described in Section 170(c) of the Internal Revenue Code (1981) 4, 9n
H.R. Rep. No. 658, 94th Cong., 1st Sess. 284 n.6 (1975) 6
S. Rep. No. 938, 94th Cong., 2d Sess. 587 n.6 (1976) 6

In the
Supreme Court of the United States

OCTOBER TERM, 1981

No.

DONALD T. REGAN, SECRETARY OF THE TREASURY, ET AL.,
APPELLANTS,
v.
TAXATION WITH REPRESENTATION OF WASHINGTON,
APPELLEE.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Motion to Intervene, for an Extension of Time in Which to File a Jurisdictional Statement, and for Expedited Consideration Thereof

---

The Disabled American Veterans ("DAV") and the Paralyzed Veterans of America ("PVA") (collectively, "Veterans") hereby move for leave to intervene as appellants in this case, for expedited consideration of this motion to permit its resolution during this term of Court, and for a thirty-day extension of time in which to file their jurisdictional statement should intervention be granted.

STATEMENT

Although this motion is the first document to be filed in the Supreme Court in this case, the Government (Treasury Secretary Regan, *et al.*), appellees in the Court of Appeals for the District of Columbia Circuit, have timely filed a notice of appeal in the appellate court and are expected to file a jurisdictional statement as appellants herein by June 22, 1982.

The Veterans have not heretofore participated in this litigation but seek to do so now as parties because, although the Court of Appeals' en banc opinion directly threatens important interests of theirs, the Veterans had not earlier been aware of the case. *See* p. 8-9, *infra*. The action was commenced by Taxation With Representation of Washington ("Taxation"), appellee in this Court. Having been denied the tax exemption it sought from the Internal Revenue Service ("IRS") under Section 501(c)(3) of the Internal Revenue Code of 1954, as amended, 26 U.S.C. § 501(c)(3), Taxation brought suit against the Government in the U.S. District Court (D.D.C.) for a declaratory judgment under 26 U.S.C. § 7428 seeking to overturn that denial on constitutional grounds.

The District Court (Pratt, J.) granted summary judgment for the Government. *Taxation with Representation of Washington* v. *Blumenthal*, 79-1 CCH U.S.T.C. ¶ 9185, 43 AFTR 2d 79-679 (D.D.C. Jan. 31, 1979). The Court of Appeals affirmed, two to one (*MacKinnon* and Robb, J.J.; Mikva, J., dissenting), but on rehearing en banc, the Court of Appeals reversed, seven to three (*Mikva*, Robinson, Wright, Tamm, Wald, Edwards and Ginsburg, J.J.; *MacKinnon*, Robb and Wilkey, J.J., dissenting). *Taxation with Representation of Washington* v. *Regan*, 82-1 CCH U.S.T.C. ¶ 9272, 49 AFTR 2d 82-961 (D.C. Cir. Mar. 26, 1982) (a copy of the en banc slip opinion is appended hereto as Exhibit A; citations hereinafter will be to the slip opinion).

Section 501(c)(3) applies to organizations, *inter alia*, "no substantial part of the activities of which is . . . attempting, to influence legislation . . . ." The IRS denied Taxation's application for qualification under § 501(c)(3) because one of its stated purposes was to attempt to influence legislation. No such restriction on legislative activities exists with respect to veterans' organizations qualified under § 501(c). In its decision respecting this disparity, the Court of Appeals held:

> By subsidizing the lobbying activities of veterans' organizations while failing to subsidize the lobbying of Taxation and other charitable groups, Congress has violated the equal protection guarantees of the Constitution.

Taxation v. *Regan*, slip op. at 2.

To remedy the constitutional defect it found, the Court of Appeals remanded the case to the District Court to fashion appropriate relief, observing:

> It seems evident that the legislative judgments expressed in Section 501(c) will be less disturbed by striking down the preferential treatment now accorded the lobbying of veterans' organizations than by extending that treatment to Section 501(c)(3) organizations.

Id. at 59. However, knowing that

> the veterans' organizations that would be directly affected by nullification of preferential treatment in Section 501(c) have not heretofore been parties to this litigation,

id., the Court of Appeals instructed the District Court to

> cure the constitutionally invalid operation of Section 501(c) after inviting veterans' organizations to participate in framing the relief.

Id. at 60.

Not content to participate only in a remedial proceeding, after learning of the decision, the Veterans simultaneously filed in the Court of Appeals a motion to intervene and for expedited consideration accompanied by affidavits from DAV and PVA (appended hereto as Exhibit B) and a timely notice of appeal (appended hereto as Exhibit C). The Veterans' motion was entered on the docket of the Court of Appeals (appended hereto as Exhibit D) before the Government's notice of appeal; the Veterans' motion and its and the Government's notices of appeal were all filed on April 23, 1982. Taxation consented to the Veterans' motion, but the Government filed an opposition (appended hereto as Exhibit E), to which the Veterans replied (appended hereto as Exhibit F). On May 27, 1982, the Court of Appeals denied the Veterans' motion without opinion (order appended hereto as Exhibit G).

As set forth in the affidavits at Exhibit B, DAV and PVA are each a veterans' organization chartered by an Act of Congress, *see* note 3 *infra*. Each is exempt from federal income taxation under § 501(c)(4) of the Internal Revenue Code of 1954, as amended, 26 U.S.C. § 501(c)(4), and contributions to each are deductible under § 170(c) of the Code. *See* IRS Publication No. 78, Cumulative List of Organizations Described in Section 170(c) of the Internal Revenue Code (1981). Each of the veterans' organizations has a legislative program by which it seeks to influence legislation to secure benefits for its members and other veterans similarly situated, and each receives

varying proportions of its annual income from deductible contributions.[1]

ARGUMENT

The Veterans should be allowed to intervene because the Congress encouraged such participation in actions under 26 U.S.C. § 7428, because their motion fully satisfies the criteria for intervention set forth in Fed. R. Civ. P. 24, because their intervention will not prejudice existing parties or the sound administration of justice, and because to relegate the Veterans to proceeding as *amici curiae* would deny them important advantages. To make intervention fully effective this motion should be decided this Term because jurisdictional statements are due from appellants this month. To give the Veterans a reasonable opportunity to prepare their consolidated jurisdictional statement without delaying the course of the litigation, the Veterans request an extension of thirty days to file it from the time it would otherwise have been due, counting from the day their notice of appeal was filed in the Court of Appeals.

I. Intervention.

A. *Statutory Considerations.*

Although there are no specific standards for intervention after judgment provided by Congress or in the federal pro-

[1] In accordance with Sup. Ct. R. 28.1, the Veterans state that there are approximately 2,500 state departments, local chapters, and auxiliary organizations nationwide affiliated with DAV. Each of these affiliates, except the National Order of Trench Rats, includes the words "Disabled American Veterans" in its name. PVA has 35 chapter affiliates located in 33 states, Mexico and Puerto Rico, and is affiliated with the Paralyzed Veterans of America Technology and Research Foundation. Each of its chapters includes the words "Paralyzed Veterans of America" in its name. PVA also has a subsidiary, PVA-EPVA, Inc., of which it is part owner.

cedure or court rules, the question of what criteria should be applied in ruling upon such a motion was answered by this Court in *International Union, Local 283 v. Scofield*, 382 U.S. 205 (1965). In *Scofield*, this Court reversed the denials by two separate Courts of Appeals of motions to intervene in appellate proceedings reviewing decisions of the National Labor Relations Board. The Court commenced its analysis by examining the statutory provisions of the Labor Act which governed the proceedings at issue and determined that Congress conferred on the petitioners before the Court a right to intervene. *Id.* at 217.

In this case, while it cannot be said that 26 U.S.C. § 7428, under which this case was originally brought, confers such a right, its legislative history does make plain that Congress intended courts to favor intervention in § 7428 proceedings. In virtually identical reports from the House and Senate committees considering the measure that contained § 7428 as part of the Tax Reform Act of 1976, Pub. L. No. 94-455, it was stated (in the Senate version) that

> the committee does intend that with respect to accepting *amicus curiae* briefs *and permitting appearances by third parties* in declaratory judgment suits under this amendment *the courts should be as generous as they can be*, in the light of the need for expeditious decisions in those cases and the general state of the courts' calendars.

S. Rep. No. 938, 94th Cong., 2d Sess. 587 n.6 (1976) (emphasis added); *see also* H.R. Rep. No. 658, 94th Cong., 1st Sess. 284 n.6 (1975).

As this Court noted in *Scofield*:

> The rights typically secured to an intervenor in a reviewing court . . . are not productive of delay nor do they cause complications in the appellate courts.

Id., 382 U.S. at 215. Accordingly, since this case does not present the considerations Congress thought might militate against third-party participation at trial, the Veterans urge this Court to exercise the generosity which Congress encouraged it to extend to third parties like the Veterans in § 7428 actions.

B. *Fed. R. Civ. P. 24.*

The discussion in *Scofield* was "limited to Labor Board review proceedings," *id.* at 210, but the Court found a helpful analogy in the Federal Rules of Civil Procedure. *Id.* at 216. Acknowledging that Fed. R. Civ. P. 24 applied only in the federal district courts, the Court nonetheless observed that "the policies underlying intervention may be applicable in appellate courts." *Id.* at 217 n.10.

1. Timeliness.

Rule 24 sets forth standards for both mandatory (Rule 24(a)) and permissive (Rule 24(b)) intervention, and begins with the phrase "upon timely application." As this Court said in ruling upon the lower-court denial of a motion to intervene after judgment:

> [T]he court where the action is pending must first be satisfied as to timeliness. Although the point to which the suit has progressed is one factor in the determination of timeliness, it is not solely dispositive. Timeliness is to be determined from all the circumstances.

NAACP v. *New York*, 413 U.S. 345, 365-6 (1973) (footnotes omitted).

More specifically, as this Court noted in referring to *NAACP* v. *New York* on this point: "The critical inquiry in every such case is whether in view of all the circumstances the intervenor acted promptly after the entry of final judgment." *United Airlines, Inc.* v. *McDonald*, 432 U.S. 385, 395-6 (1977). *McDonald* focused on whether a motion to intervene, filed after entry of a district court's final judgment, was timely. Since Fed. R. App. P. 4(a) requires that a notice of appeal be filed in the district court within thirty days after the entry of judgment, and the movant-respondent in *McDonald* filed her motion to intervene within that period, this Court concluded that she had timely filed, *id.* at 396, and, therefore, affirmed the appellate decision permitting her to intervene.

Similarly here, the Veterans filed their motion to intervene (and their notice of appeal) within the time allowed for filing a notice of appeal. Since the Court of Appeals held that an Act of Congress was unconstitutional, *supra* p. 3, 28 U.S.C. § 1252 makes its judgment appealable to this Court. Under Sup. Ct. R. 11.2 and 28 U.S.C. § 2101, a notice of appeal in such a case must be filed in the Court of Appeals within thirty days from the entry of judgment, or by April 26, 1982. The Veterans filed their motion to intervene and notice of appeal on April 23, 1982.

The other significant circumstance which operates to make the Veterans' motion timely, despite the stage to which the suit has progressed, is that they only recently became aware, not only of the need to act to protect their interests in this case, but also of the very existence of the litigation. As recited in the DAV and PVA affidavits at Exhibit B, the Veterans did not know about the pendency of this case until after the en banc decision of the Court of Appeals was announced (and given widespread publicity). The Veterans' state of knowledge on this score is not surprising since, as indicated earlier, *supra* p. 2, the decisions of the District Court and the panel of the

Court of Appeals that originally heard the appeal each rejected Taxation's claims (which in any event did not challenge the tax status of veterans' organizations) and thus raised no prospect of jeopardy that might have come to the Veterans' attention. Once learning of the en banc decision, however, the Veterans moved promptly and took the earliest possible step they could have taken to protect their interests herein by seeking to intervene and appeal the decision.

2. Veterans' Interest.

Rule 24(a)(2) makes intervention a matter of right when the movant claims an "interest" in the subject of the action and the disposition of the action "may" interfere with his/her ability to protect that interest unless it is "adequately represented" by existing parties. There is no doubt that important interests of the Veterans are at stake in this case, and the Veterans should be allowed to intervene to protect their interests because existing parties may not effectively do so.

Section 170(c)(3) of the Code, 26 U.S.C. § 170(c)(3), makes deductible contributions to a "post or organization of war veterans" regardless of whether its qualification for income-tax exemption is based upon § 501(c)(4)[2] (like DAV and PVA) or § 501(c)(19) (like other veterans' organizations). The opinion of the Court of Appeals creates a clear risk to the ability of veterans' organizations to maintain both their tax-exempt status under § 501(c) (and the tax-deductible status of con-

---

[2] The Court of Appeals stated that Section 501(c)(4) organizations "are not eligible to receive tax-deductible contributions" and that they "may lobby but receive no tax-deductible contributions." *Taxation* v. *Regan*, slip op. at 9 and 12. The court's generalization is not correct concerning veterans' organizations qualified under Section 501(c)(4) which, like any "organization of war veterans," may receive contributions which are deductible by the donors. 26 U.S.C. § 170(c)(3); *see* IRS Publication No. 78, *supra* p. 4.

tributions to them under § 170(c)(3)) and their ability to attempt to influence legislation without restriction and without government regulation.[3] The Court of Appeals itself expressly recognized that veterans' organizations would be "directly affected" by the remedy it found "most logical." *Taxation* v. *Regan*, slip op. at 59.[4]

3. Adequacy of Representation.

The inadequacy of representation of the Veterans by existing parties was also demonstrated by the Court of Appeals, which provided an indication that the Government is not effectively representing those groups (because, the Veterans would argue, it is defending the federal statutory scheme generally and not the specific interests of veterans' organizations). On the critical question of identifying public objectives that might support the classification within § 501(c) for purposes of an equal protection analysis, and as to which the

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[3] The Congressional charters of DAV and PVA limit the purposes of those organizations to activities that affect or directly benefit persons who satisfy the restrictive membership qualifications of each organization. 36 U.S.C. §§ 90c and 1153. Each organization's charter also states that the organization is nonpolitical and may not promote the candidacy of any person seeking public office. 36 U.S.C. §§ 90f and 1156.

[4] While it is sometimes the case that, were the movant to intervene after judgment not allowed to participate as a party, there would be no person able to seek review of the case to protect the interests of the movant, this Court has granted intervention in numerous cases before it where there was no necessity to do so in order to insure review of the lower court decision in question. *See, e.g., Dames & Moore* v. *Regan*, 452 U.S. 932 (1981); *NLRB* v. *Baptist Hospital, Inc.*, 440 U.S. 943 (1979); *Banks* v. *Chicago Grain Trimmers*, 389 U.S. 813 (1967); *NLRB* v. *Acme Industrial Co.*, 384 U.S. 925 (1966); *Eastern-Central M.C. Assn.* v. *U.S.*, 321 U.S. 194 (1944); *U.S.* v. *Terminal R.R. Assn.*, 236 U.S. 194, 199 (1915) ("although the petitioners were not parties, they are entitled to be originally heard concerning the settlement of the decree insofar as it might operate prejudicially to their rights").

Court of Appeals found "no identifiable governmental interests," *id.* at 51, the court noted: "The government made no attempt in the district court to present affidavits or other evidentiary material." *Id.* at 35. Moreover, if the Veterans were, for example, to seek a disposition of the case on grounds of justiciability (now under consideration) and the Government were to insist on a merits resolution (see Exhibit E, at 2), there would be an evident conflict between the two.[5] It should be emphasized in this context that the test under Rule 24(a)(2) is only that there "may" be inadequate representation, and the burden of showing that should be "minimal." *Trbovich* v. *UMW*, 404 U.S. 528, 529 n.10 (1972).

4. Common Issues.

Finally, the Veterans submit that the Court should permit them to intervene because their position regarding the constitutionality of their tax status presents a question in common with the issues in this case, satisfying the standard for permissive intervention under Rule 24(b)(2).

C. *Other Considerations Favoring Intervention.*

Other factors appropriately considered in evaluating a motion to intervene also operate in favor of allowing the Veterans' motion. First, granting the motion to intervene at the appellate level will not prejudice existing parties nor adversely affect the administration of justice, *see Scofield*, *supra* pp. 6-7, particular-

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[5]The fact that an intervenor might present new and different issues to the Court were intervention granted is a factor favoring the grant. As *Scofield*, *supra*, declared, "Participation in defining the issues before the court guarantees that all relevant material is brought to its attention, and makes the briefs on the merits more meaningful." 382 U.S. at 215.

ly since the Veterans will consolidate their positions into a single submission in all subsequent filings as they have in this one.

Second, there are important procedural advantages to proceeding as parties rather than as *amici curiae* which would enhance the Veterans' ability to protect the interests they have at stake. They include, at the jurisdictional stage, the right to file a thirty-page jurisdictional statement rather than a twenty-page brief supporting the Government, *compare* Sup. Ct. R. 15.3 *with* Sup. Ct. R. 36.1, and the right to file a ten-page reply rather than no reply. *Compare* Sup. Ct. R. 16.5 *with* Sup. Ct. R. 36.2. Should the Court note probable jurisdiction, the advantages further include the authority to file a fifty-page rather than a thirty-page brief on the merits, *compare* Sup. Ct. R. 34.3 *with* Sup. Ct. R. 36.2, and the right to file a twenty-page reply rather than no reply. *Compare* Sup. Ct. R. 34.4 *with* Sup. Ct. R. 36.2. The comparatively greater attention paid to briefs submitted by parties over that paid to briefs *amici curiae* is not as quantifiable a benefit, but the Veterans suggest it is one just as real.[6]

Last, DAV and PVA have a collective membership of over 700,000, all of whom are veterans of service in the United States Armed Forces who suffer spinal-cord injury or disease or who otherwise possess disabilities formally recognized under

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[6] That the United States shares the Veterans' view that it is more valuable to participate in the Supreme Court as an intervenor than as an *amicus curiae* is evidenced by at least one recent occasion in which the Government sought and obtained that preferred status. Following the decision earlier this year by the Court of Appeals for the District of Columbia Circuit in *Consumer Energy Council of America* v. *FERC*, Nos. 80-2184 *et al.*, regarding the constitutionality of the legislative veto, the Government filed in the appellate court a motion to intervene — even though it had previously participated in the case as an *amicus curiae* — "in order to present fully the views of the Executive . . . before the Supreme Court." The Court of Appeals granted that motion. The motion of the United States and the Court's order are appended hereto as Exhibit H.

federal law. The consequences of an adverse ruling on the merits of this case to the Veterans alone would thus reach pervasively into American society to affect persons who by their very status have traditionally received special consideration, not only by such a ruling's technical potential tax consequences, but perhaps more importantly by the announcement of a principle that results in essence in a diminution of a status held by veterans' organizations for nearly fifty years. Under these circumstances, absent a sound reason militating against their intervention and in light of the unique history and procedural posture of this case, the Veterans submit that they should be accorded the advantages accruing to parties before the Supreme Court of the United States.

II. Expedition.

Assuming that a grant of the Veterans' motion to intervene would operate *nunc pro tunc*, their notice of appeal would have been effective upon filing on April 23, 1982. As noted earlier, *supra* p. 8, the Court's jurisdiction in this case is predicated on 28 U.S.C. § 1252. Under 28 U.S.C. § 2101 and Sup. Ct. R. 12.1, the Veterans would therefore have to docket their appeal by filing a jurisdictional statement by June 22, 1982. Since this Term of Court is rapidly coming to a close, the Veterans would ask for a decision on their motion before that occurs, in time for them timely to docket their appeal if intervention is granted. The Court need not await a response before deciding this motion, Sup. Ct. R. 42.4; in any event, the response of existing parties in the Court of Appeals has been provided, *supra* p. 4, and undersigned counsel orally informed the Solicitor General's office on June 1, 1982, and counsel for Taxation on June 3, 1982, that this motion would be filed on June 4, 1982.

III. Extension of Time.

If intervention is granted, the Veterans further ask, pursuant to Sup. Ct. R. 29.2 and 12.2, that this Court extend the time for filing its jurisdictional statement to July 21, 1982. Were the Veterans to be required to file their jurisdictional statement at the same time as the Government since their notices of appeal were filed on the same day, they would have little more than a week after learning of their intervenor status to prepare that document, assuming that this Court rules on the Veterans' motion as expeditiously as possible. Parties have sixty days from the filing of the notice of appeal to file their jurisdictional statement. Sup. Ct. R. 12.1. The Veterans request considerably less time than this.[7] Allowing the Veterans' appeal to be docketed in mid-July would not affect the course of the litigation because no decision would be made on jurisdiction in this case until October 4, 1982, at the earliest.[8]

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[7] The Veterans have no reason to be prepared earlier than the requested date because, were they left to proceed as *amici curiae*, their brief in support of the Government's jurisdictional statement would not be due until 30 days after appellee Taxation receives the latter, which would likely be no earlier than it is now due to to be filed (June 22, 1982). *See* Sup. Ct. R. 36.1 and 16.1.

[8] Because of the need to move swiftly in this Court following the decision of the Court of Appeals, the Veterans originally filed this motion in typewritten form on June 4, 1982 and represented, in this same footnote space in the typewritten motion, that they would, as required by Sup. Ct. R. 42.2(b) and as soon as practicable, provide the Court with 40 printed copies of the motion in this form as requested by the clerk of the court.

CONCLUSION

For the foregoing reasons, the Veterans ask that the Court grant their several requests.

Respectfully submitted,

JOSEPH C. ZENGERLE*
BYRON R. TRAUGER
BINGHAM, DANA & GOULD
1724 Massachusetts Avenue, N.W.
Washington, D.C. 20036
(202) 822-9320
Counsel for Disabled American Veterans and Paralyzed Veterans of America
*Counsel of Record

Index to Appendix
to Motion to Intervene, etc.
in Regan v. Taxation, No. ,
Filed June 4, 1982

EXHIBIT A	Opinion of the Court of Appeals for the District of Columbia Circuit (en banc)
EXHIBIT B	Motion of Disabled American Veterans and Paralyzed Veterans of America to Intervene, with accompanying Affidavits
EXHIBIT C	Notice of Appeal of Disabled American Veterans and Paralyzed Veterans of America
EXHIBIT D	Court of Appeals Docket
EXHIBIT E	Government's Opposition to Motions for Intervention
EXHIBIT F	Reply of Disabled American Veterans and Paralyzed Veterans of America to Government's Opposition
EXHIBIT G	Order of Court of Appeals Denying Motion to Intervene
EXHIBIT H	Government's Motion to Intervene and Order of Court of Appeals granting motion in *Consumer Energy Council of America* v. *FERC*

81-2338

No.

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CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

DONALD T. REGAN, SECRETARY OF THE TREASURY, *et al.*,
Appellants,

v.

TAXATION WITH REPRESENTATION OF WASHINGTON,
Appellee.

On Appeal from the United States Court of Appeals for the District of Columbia Circuit

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MOTION OF THE VETERANS OF FOREIGN WARS OF THE UNITED STATES FOR LEAVE TO INTERVENE

Of Counsel:
GEORGE H. GANGWERE
LAWRENCE M. MAHER
SWANSON, MIDGLEY, GANGWERE, CLARKE & KITCHIN
1500 Commerce Bank Building
Kansas City, Missouri 64106

WILMER S. SCHANTZ, JR.
6736 Old McLean Village Drive
McLean, Virginia 22101

SHELDON S. COHEN
Counsel of Record
JULIE NOEL GILBERT
DENNIS B. DRAPKIN
RICHARD D'AVINO

COHEN AND URETZ
Suite 400
1775 K Street, N.W.
Washington, D.C. 20006
Telephone: (202) 835-7300

Counsel for the Veterans of Foreign Wars of the United States

June 11, 1982

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
ISSUE PRESENTED	1
STATEMENT OF THE CASE	2
BACKGROUND	4
DISCUSSION	5
A. The Necessity Of Intervention Was Recognized In The En Banc Decision Of The Court Of Appeals	5
B. The VFW Meets The Applicable Standards For Intervention	6
1. The VFW Has Interests That Are Vitally Affected By This Litigation	7
2. The Interests Of The VFW Are Not Adequately Represented By The Existing Parties Or By Other Prospective Intervenors	8
3. The Motion To Intervene Satisfies The Applicable Timeliness Requirement	11
CONCLUSION	13
APPENDIX A—Slip Opinion Of The United States Court Of Appeals For The District Of Columbia Circuit (en banc) In *Taxation With Representation Of Washington v. Donald T. Regan, Secretary Of Treasury, et al.*	1a
APPENDIX B—Motion Of The Veterans Of Foreign Wars Of The United States To Intervene Filed In The United States Court Of Appeals For The District Of Columbia Circuit	1b
APPENDIX C—Order Of The United States Court Of Appeals For The District Of Columbia Circuit Denying The Motions To Intervene	1c
APPENDIX D—Docket Sheet Of The United States Court Of Appeals For The District Of Columbia Circuit	1d

TABLE OF AUTHORITIES

CASES:	Page
Hodgson v. United Mine Workers, 473 F.2d 118 (D.C. Cir. 1972)	11
International Union, Local 283 v. Scofield, 382 U.S. 205 (1965)	6, 7
Iowa-Des Moines Nat'l Bank v. Bennett, 284 U.S. 239 (1931)	6
McDonald v. E.J. Lavino Co., 430 F.2d 1065 (5th Cir. 1970)	11
Skinner v. Oklahoma, 316 U.S. 535 (1942)	6
Taxation with Representation of Washington v. Regan, 82-1 U.S. Tax Cas. (CCH) ¶ 9272 (D.C. Cir. March 26, 1982) (en banc)	1, 3, 4, 8, 9, 10, 12
United Airlines, Inc. v. McDonald, 432 U.S. 385 (1977)	11
United States v. Paramount Pictures, Inc., 334 U.S. 131 (1947)	6
United States v. Terminal R.R. Ass'n., 236 U.S. 194 (1915)	6
Welsh v. United States, 398 U.S. 333 (1970)	6
CONSTITUTION:	
First Amendment	3
Fifth Amendment	3, 8
STATUTES:	
Act of June 25, 1948, Judiciary and Judicial Procedure, 28 U.S.C. § 1251, *et seq.* (1966 and Supp. 1982):	
28 U.S.C. § 1252	1, 13
28 U.S.C. § 2101(a)	13
28 U.S.C. § 2101(c)	1, 13
Act of May 28, 1936, 36 U.S.C. § 111, *et seq.* (1968 and Supp. 1982):	
36 U.S.C. § 114	4
36 U.S.C. § 115	4
Internal Revenue Code of 1954, 26 U.S.C. § 1, *et seq.* (1954 & Supp. 1982):	

TABLE OF AUTHORITIES—Continued

	Page
26 U.S.C. § 170(c)	2
26 U.S.C. § 170(c)(2)	3
26 U.S.C. § 170(c)(3)	3
26 U.S.C. § 501(a)	2
26 U.S.C. § 501(c)	3
26 U.S.C. § 501(c)(3)	3
26 U.S.C. § 501(c)(4)	5, 10
26 U.S.C. § 501(c)(19)	3, 5, 10
26 U.S.C. § 7428	2
RULES:	
Federal Rules of Civil Procedure:	
Fed. R. Civ. P. 24	6, 7, 10, 11
Fed. R. Civ. P. 24(a)(2)	7, 8, 9
Supreme Court of the United States Revised Rules:	
Sup. Ct. R. 13.1	13
Sup. Ct. R. 28.1	4
Sup. Ct. R. 42.2(b)	2
SECONDARY AUTHORITIES:	
3B J. Moore, Moore's Federal Practice ¶ 24.13[1] (2d ed. 1948 and Supp. 1982)	11
C. Wright and A. Miller, Federal Practice: Civil § 1916 (1972)	12
Note, The Requirement Of Timeliness Under Rule 24 Of The Federal Rules Of Civil Procedure, 37 Va.L.Rev. 863 (1951)	12

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

No. ———

DONALD T. REGAN, SECRETARY OF THE TREASURY, *et al.*,
Appellants,

v.

TAXATION WITH REPRESENTATION OF WASHINGTON,
Appellee.

On Appeal from the United States Court of Appeals for the District of Columbia Circuit

---

MOTION OF THE VETERANS OF FOREIGN WARS OF THE UNITED STATES FOR LEAVE TO INTERVENE

ISSUE PRESENTED

The decision of the United States Court of Appeals for the District of Columbia Circuit in *Taxation with Representation of Washington v. Regan*, 82-1 U.S. Tax Cas. (CCH) ¶ 9272 (D.C. Cir., March 26, 1982) (attached as Appendix A) (hereinafter referred to as Slip Op.) with respect to which a notice of appeal has been filed,[1] affects directly and substantially the interests of

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[1] The appeal has not been docketed in this Court pursuant to 28 U.S.C. 1252 and 2101(c) because the jurisdictional statement has not yet been filed. The first document filed in this Court was the Motion to Intervene, for an Extension of Time in Which to File a Jurisdictional Statement, and for Expedited Consideration Thereof, filed on June 4, 1982, by the Disabled American Veterans

the Veterans of Foreign Wars of the United States ("VFW"). Due to the nature of the case, the VFW has not heretofore participated in any fashion, and has had no opportunity to articulate and to protect its own institutional interests and the interests of its members. Those interests of the VFW have not and cannot be represented adequately by any party to this case. It is possible that this Court will dispose of the case in such a way that the VFW will suffer the loss of significant benefits without having had the opportunity to participate as a party and will be deprived of the opportunity to articulate its interests fully and forthrightly. The VFW therefore respectfully moves for leave to intervene before this Court, in order to participate for the first time in a case which is of fundamental importance to it.[2]

STATEMENT OF THE CASE

Seeking a declaration that it qualifies for exempt status, Taxation with Representation of Washington ("TWR") commenced this action in the United States District Court for the District of Columbia under section 7428.[3] The district court upheld the determination of the Internal Revenue Service that TWR's application for exempt status must be denied on the ground that attempts

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and the Paralyzed Veterans of America. By separate letters dated June 9, 1982, the VFW and the American Legion informed the Court of their intentions to file motions for leave to intervene in the case.

[2] Due to the necessity for prompt action in this Court, the VFW has filed this motion in type-written form. As soon as practicable the VFW will provide the Court with 40 printed copies of the motion as required by Sup. Ct. R. 42.2(b).

[3] All references to sections herein are to sections of the Internal Revenue Code of 1954, as amended to the date of this motion, unless otherwise indicated. 26 U.S.C. § 1, *et seq.* "Exempt status" includes exemption from federal income tax under section 501(a) and the ability to receive tax-deductible contributions under section 170(c).

to influence legislation may constitute a substantial part of TWR's actvities. *See* sections 170(c)(2) and 501(c)(3).

A panel of the United States Court of Appeals for the District of Columbia Circuit affirmed the district court. On rehearing, however, the court of appeals *en banc* held that the governing statutory scheme violated the rights of TWR to equal protection of the law.

In the view of the court of appeals, equal protection is violated because TWR's ability to receive tax-deductible contributions is limited by reason of its proposed lobbying activities, while no such limitation applies to veterans' organizations such as the VFW. *Compare* sections 501(c)(3) and 170(c)(2) *with* sections 501(c)(19) and 170(c)(3). In reaching this conclusion, the court was unable to find on the basis of the meager record before it evidence of sufficiently important governmental interest to support the distinction drawn between charitable organizations and veterans' groups with respect to lobbying activities. The court held that because the distinction affected lobbying, a protected First Amendment activity, the distinction contravened the guarantee of equal protection of the law provided in the Fifth Amendment.

The court of appeals did not attempt to cure the constitutionally invalid statutory scheme by framing relief. It suggested, however, that the constitutional defect could be remedied either by "extending the lobbying treatment now given to veterans' organizations to all Section 501(c)(3) groups" or "by striking down the preferential treatment now accorded the lobbying of veterans' organizations." Slip Op. at 56, 59. The court of appeals declined to prescribe a remedy because it recognized that the "veterans' organizations that would be directly affected by nullification of preferential treatment in Section 501(c) have not heretofore been parties to this litigation." Slip Op. at 59. The case was, therefore, remanded to the district court "with the instruction that

it cure the constitutionally invalid operation of Section 501(c) after inviting veterans' organizations to participate in framing the relief." Slip Op. at 60. An order of remand might not, however, offer a satisfactory opportunity to reexamine the court of appeals holding on the constitutional issue.

After the judgment of the court of appeals was issued, the United States timely filed a notice of appeal to the United States Supreme Court. This Court, therefore, may consider the issues presented to the court of appeals, including, if necessary, the issue of remedy, prior to or in lieu of reconsideration by the district court.

BACKGROUND

The VFW is a federally chartered veterans' organization established by act of Congress.[4] Act of May 28, 1936, ch. 471, § 1, 49 Stat. 1390, *codified at* 36 U.S.C. § 111, *et seq.* The VFW has approximately 1.9 million members and is one of the country's largest veterans' organizations. Membership is available to veterans who have served in "any foreign war, insurrection, or expedition, which service [was] recognized as campaign-medal service and governed by the authorization of the award of a campaign badge by the Government of the United States of America." 36 U.S.C. § 115. The VFW engages in extensive activities on behalf of veterans, including efforts to secure and to maintain adequate veterans' benefits and to assist veterans in obtaining benefits to which they are entitled. The organization operates a legislative affairs office in Washington, D.C., and some

[4] In accordance with Sup. Ct. R. 28.1, the VFW, a corporation, states that it has no parent companies, subsidiaries, or affiliates. There are, however, over 10,000 state departments, county councils, districts, and posts throughout the United States. These local units have been established pursuant to 36 U.S.C. § 114, and each includes the words "Veterans of Foreign Wars" in its name. In addition, the VFW has formed a political action committee, known as "VFW-PAC."

of its activities involve lobbying. The organization's budget is funded, in part, by tax-deductible contributions.

The VFW was organized in 1914. From its incorporation in 1936 until 1974, the VFW was exempt from federal income taxation under section 501(c)(4) or its predecessor provisions. In 1974, the VFW received recognition of exempt status under section 501(c)(19), the then-newly enacted provision relating exclusively to veterans' organizations. Contributions and bequests to the VFW have been deductible for purposes of determining federal income, estate, and gift taxes from 1936 until the present. Thousands of VFW posts similarly enjoy tax-exempt status and the ability to receive tax-deductible contributions.

DISCUSSION

Fundamental fairness requires that this Court allow intervention by the VFW in this case, so that it may participate as a party in a proceeding in which its institutional interests are so vitally and directly affected. Although the proceeding was commenced by TWR alone, and was brought solely for the purpose of determining TWR's exempt status, the court of appeals' decision has extended the scope of the litigation so that a final decision affects the interests of the VFW as well as TWR. In fact, under the court's decision, the interests of VFW at issue are as significant as the interests that TWR initially sought to assert.

A. The Necessity Of Intervention Was Recognized In The En Banc Decision Of The Court Of Appeals

The court of appeals recognized in its opinion that participation by veterans' organizations was necessary before a final decision affecting their rights could in fairness be made. It was for this reason that the court remanded the case to the district court with the order that it invite veterans' organizations to participate in the litigation before relief was framed. The remand to

the district court contemplated by the court of appeals, however, will not at this time occur and the case will first be considered by this Court.

This Court may determine that the statutory scheme here at issue is constitutional. If this Court affirms the court of appeals' finding of constitutional invalidity, however, it may decide, unlike the court of appeals, not to defer to the district court, but instead to frame appropriate relief. *See e.g., Welsh v. United States*, 398 U.S. 333, 361-65 (1970) (Harlan, J., concurring); *Skinner v. Oklahoma*, 316 U.S. 535, 543 (1942); *Iowa-Des Moines Nat'l Bank v. Bennett*, 284 U.S. 239, 247 (1931). Consequently, the precise concern with the obligation of fairness to veterans' groups that gave rise to the court of appeals' mandate to the district court to invite such groups to participate remains present, despite the change in the procedural posture of the case. In order to meet this obligation of ensuring that veterans' organizations have the opportunity to participate fully before a final decision affecting their rights is made, intervention in the litigation is essential.

B. The VFW Meets The Applicable Standards For Intervention

This Court has granted motions for leave to intervene following a final judgment by the court of appeals.[5] In *International Union, Local 283 v. Scofield*, 382 U.S. 205 (1965), the Court suggested that the standards to apply in determining whether intervention should be allowed in appellate courts were those expressed in Rule 24 of the Federal Rules of Civil Procedure. *Id.* at 217, n.10. Although the opinion in *Scofield* was by its terms "limited

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[5] *See* United States v. Terminal R.R. Ass'n, 236 U.S. 194 (1915). *Cf.* United States v. Paramount Pictures, Inc., 334 U.S. 131 (1947) (Court recognized its authority to defer its decision on a motion for leave to intervene until disposition of the action, while permitting prospective intervenors to participate in the forum as parties).

to Labor Board review proceedings," 382 U.S. at 216,[6] it is nevertheless instructive. Rule 24 requires that an application for intervention must show (i) that the applicant has an interest in the subject matter of the action, (ii) that the interest is not adequately represented by an existing party, and (iii) that the motion is timely filed.

1. ***The VFW Has Interests That Are Vitally Affected By This Litigation***

Rule 24(a)(2) provides for intervention as a matter of right if the applicant claims "an interest relating to the property or transaction which is the subject of the action and he is so situated that disposition of the action may as a practical matter impair or impede his ability to protect that interest." The VFW satisfies this standard for intervention as a matter of right because it is so situated that disposition of this action by the Court may impair its ability to protect its present federal income tax status.

If this Court ultimately agrees with the court of appeals' resolution of the constitutional issue and determines the remedy in accordance with the plain suggestion of the opinion of that court, the lobbying activities of the VFW may be affected and its ability to receive tax-deductible contributions may be jeopardized. If this motion is denied, the VFW will have no opportunity to participate as a party in a proceeding that affects these important interests. Because disposition of the action without involvement of the VFW would affect it so directly, the VFW has an interest in the subject matter of this action within the meaning of Rule 24.

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[6] The opinion was so limited in recognition that when "considering the propriety of intervention in the courts of appeals . . . Federal agencies are not fungibles for intervention purposes—Congress has treated the matter with attention to the particular statutory scheme and agency." International Union, Local 283 v. Scofield, 382 U.S. 205, 207 (1965).

2. *The Interests Of The VFW Are Not Adequately Represented By The Existing Parties Or By Other Prospective Intervenors*

In addition to requiring that the claims of an intervenor be closely related to those at issue in the pending case, Rule 24(a)(2) requires that the prospective intervenor's interest not be represented adequately by the existing parties. Neither the existing parties nor the two parties that have filed a joint motion to intervene can represent adequately the VFW's interest before this Court.

TWR obviously has interests that conflict with those of the VFW. TWR has taken the position that the distinction drawn with respect to lobbying between charitable organizations like itself, and veterans' groups like the VFW, is violative of the Fifth Amendment. The VFW believes that the current statutory scheme is not violative of any constitutional provision. TWR thus clearly cannot represent adequately the VFW's interest in this litigation.

In addition, the United States does not represent adequately the interests of the VFW. Although the United States has an obligation to support the constitutionality of the statutory scheme here at issue, the VFW, as a veterans' organization that has operated since 1914, is in a better position than is the government to articulate the interests justifying the special treatment that Congress has accorded such organizations.

The inadequacy of the government's representation of the VFW's interest in this respect is illustrated in the opinion of the court of appeals. The court there noted that the government failed to present affidavits or other factual information regarding the particular provisions of law to which veterans' organizations are subjected. Slip Op. at 35. Nevertheless, the court proceeded to discuss in some detail the activities of the VFW. *See e.g.*,

Slip Op. at 11-17. Perhaps as a result of the VFW's lack of participation before the court, the opinion contains certain factual inaccuracies. *See* Slip Op. at 12 and 16, n.15. For example, the court stated that the VFW endorsed a presidential candidate in the 1980 election. Slip Op. at 16-17, n.15. In fact, the candidate was supported by a political action committee that receives no tax-deductible contributions. *See* Slip Op. at 35, n.51 (MacKinnon, J., dissenting). Moreover, the court included examples of supposed lobbying by the VFW. Slip Op. at 12, n.12. In many of the cited instances, the VFW in fact undertook no lobbying. It is difficult to estimate the effect such factual errors may have had on the court or on its analysis of the constitutional issue. Because the resolution of this case is dependent to some extent on factual analysis concerning veterans' organizations, the VFW has an interest in presenting accurate and pertinent facts concerning its organization and operation.

The inability of the United States to represent sufficiently the interests of the VFW goes beyond its limitations with respect to factual information and analysis. If the statutory scheme at issue is found finally to be unconstitutional, the United States might determine that the proper method of curing the constitutional defect would be to impose restrictions on the lobbying activity of veterans' organizations. The VFW, however, believes that the proper remedy, assuming that one were required, would be to eliminate any constitutional defect without disturbing the ability of veterans' organizations to engage in legislative activities. Accordingly, to the extent that the question of remedy is before this Court, the interests of the VFW and the United States are potentially in conflict and the United States cannot adequately represent the interests of the VFW within the meaning of Rule 24(a)(2).

Finally, the fact that the Disabled American Veterans (DAV) and the Paralyzed Veterans of America (PVA) have filed a motion to intervene does not detract from the VFW's own right to intervene. First, this Court has not yet granted their motion. Those veterans' organizations, therefore, are not "existing parties" within the meaning of Rule 24.

More importantly, however, even if the DAV and PVA were existing parties, the VFW has an independent interest in participating in subsequent proceedings before this Court. There are significant differences both in history and in operation among the veterans' organizations seeking to intervene, as well as differences in the statutory basis for tax-exempt status.[7] The VFW has over twice as many members as the DAV and PVA combined, has entirely different membership criteria, and has long been an active, visible organization representing veterans' interests generally. It may be for this latter reason that the opinion of the court of appeals specifically referred on several occasions to the VFW and the manner in which it is organized and operated. Slip Op. at 12-17. The VFW seeks the opportunity to correct erroneous impressions and present fully the relevant circumstances surrounding its operations, prior to further judicial consideration of the underlying legal issues. Moreover, the VFW has a vital interest in the formulation of the remedy, should one be required, to reflect its own circumstances. Therefore, the VFW has an independent reason for, and interest in, participating in any further proceedings, regardless of the participation of the other veterans' organizations.

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[7] While the VFW is exempt from tax under section 501(c)(19), the DAV and the PVA are exempt from tax under section 501(c)(4).

3. *The Motion To Intervene Satisfies The Applicable Timeliness Requirement*

The final requirement of Rule 24 is that the application be "timely" filed. The question of timeliness "does not depend solely upon the amount of time that may have elapsed since the institution of the action . . . ." 3B J. Moore, Moore's Federal Practice ¶ 24.13[1] (2d ed. 1948 and Supp. 1982).[8] "The critical inquiry . . . is whether in view of all the circumstances the intervenor acted promptly after the entry of final judgment." *United Airlines, Inc. v. McDonald*, 432 U.S. 385, 395-396 (1977). In considering whether a motion to intervene has been timely filed, courts generally consider the purpose of, the necessity for, and the probability of prejudice from intervention. *See e.g., Hodgson v. United Mine Workers*, 473 F.2d 118, 130 (D.C. Cir. 1972).

The VFW acted as promptly as could reasonably be required after entry of judgment by the court of appeals. The VFW was not notified by either the district court or the court of appeals that disposition of TWR's declaratory judgment action might deprive it of a valuable right. Once the opinion and judgment of the court of appeals were rendered, the VFW realized the possibility that it could be aggrieved by the ultimate decision. The mandate of the court of appeals, however, required that the district court, before further proceedings, invite the participation of veterans' organizations such as the VFW.

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[8] The United States Court of Appeals for the Fifth Circuit, illustrating the flexibility inherent in the timeliness requirement of Rule 24, stated that

> "[t]imeliness" is not a word of exactitude or of precisely measurable dimensions. The requirement of timeliness must have accommodating flexibility toward both the court and the litigants if it is to be successfully employed to regulate intervention in the interest of justice.

McDonald v. E. J. Lavino Co., 430 F.2d 1065, 1074 (5th Cir. 1970). Application of the requirement, in light of its imprecision, is left to the court's discretion.

Slip Op. at 60. Indeed, the VFW would have undertaken to represent its interests had such a proceeding occurred.

A certified copy of the judgment and a copy of the opinion of the court of appeals were issued as an mandate to the district court on April 8, 1982. At that time it still appeared that the proceeding would continue in the district court pursuant to the court of appeals' mandate, and that veterans' groups would be invited to intervene by the district court. On April 16, 1982, however, the court of appeals, pursuant to the untimely-filed Motion of the United States for Stay of Mandate,[9] recalled the mandate, pending the filing of a notice of appeal to this Court, and stayed its issuance for 30 days. When the United States filed a notice of appeal on April 23, 1982, it became apparent that this Court would consider the case prior to the remand contemplated by the court of appeals' opinion and judgment. The VFW obtained counsel on April 29, 1982, and filed a motion to intervene in the court of appeals on May 3, 1982.[10] That motion was denied. The VFW thus acted promptly to intervene once it became apparent that the matter would be considered by this Court.

In addition to the promptness with which the prospective intervenor acts, prejudice to existing parties is an important consideration in determining whether a motion to intervene is timely filed. *See generally*, C. Wright and A. Miller, Federal Practice: Civil § 1916 (1972); Note, *The Requirement of Timeliness Under Rule 24 of the Federal Rules of Civil Procedure*, 37 Va. L. Rev. 863, 867 (1951). Intervention by the VFW will not prejudice the existing parties.

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[9] The court of appeals construed the motion for stay of mandate as a motion to recall the mandate previously issued.

[10] The VFW filed a "corrected" copy of the motion on May 4, 1982 to reflect correction of five typographical errors in the original motion. The United States, in a consolidated response, opposed all the motions to intervene filed in the court of appeals.

The VFW's intervention will not delay the proceedings before this Court. After filing its notice of appeal, the Government has sixty days in which "the record shall be made up and the case docketed . . . ." 28 U.S.C. § 2101 (a). *See also* Sup. Ct. R. 13.1. The Government has not yet docketed the case by filing its jurisdictional statement, *see* 28 U.S.C. §§ 1252 and 2101(c), and this motion has been filed prior to the time that any documents are due to be filed in the Supreme Court. Therefore, the VFW will be able to file timely its statement pertaining to jurisdiction as well as its briefs. By granting this motion, therefore, the Court will not prejudice the other parties by delaying the disposition of this appeal.

Finally, TWR, the party whose interests in the constitutional issue are inherently adverse to those of the VFW, has authorized counsel to represent to this Court that it has no objection to this motion. The acquiescence of a clearly adverse party, while not essential, is evidence of the absence of prejudice resulting from the VFW's intervention.

CONCLUSION

Having satisfied all the requirements for intervention, the VFW respectfully requests that this Court grant this motion for leave to intervene.

Respectfully submitted,

Of Counsel:
GEORGE H. GANGWERE
LAWRENCE M. MAHER
SWANSON, MIDGLEY, GANGWERE, CLARKE & KITCHIN
1500 Commerce Bank Building
Kansas City, Missouri 64106

WILMER S. SCHANTZ, JR.
6736 Old McLean Village Drive
McLean, Virginia 22101

SHELDON S. COHEN
JULIE NOEL GILBERT
DENNIS B. DRAPKIN
RICHARD D'AVINO
COHEN AND URETZ
1775 K Street, N.W.
Suite 400
Washington, D.C. 20006
Telephone: (202) 835-7300
Counsel for the Veterans of Foreign Wars of the United States

APPENDIX A

Slip Opinion Of The United States Court of Appeals For The District Of Columbia Circuit (en banc) In *Taxation With Representation Of Washington v. Donald T. Regan, Secretary Of Treasury, et al.*

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 79-1464

TAXATION WITH REPRESENTATION OF WASHINGTON,
Appellant

v.

DONALD T. REGAN, SECRETARY OF THE TREASURY, ET AL.

Appeal from the United States District Court
for the District of Columbia
(D.C. Civil Action No. 78-0834)

Argued En Banc October 14, 1981

Decided March 26, 1982

John Cary Sims with whom *Alan B. Morrison* and *Thomas F. Field* were on the brief for appellant.

Frank P. Cihlar, Attorney, Department of Justice, with whom *John F. Murray*, Acting Assistant Attorney General, *Charles F. C. Ruff*, United States Attorney at the time the briefs were filed, *Michael L. Paup* and *Richard Farber*, Attorneys, Department of Justice, were on the brief for appellees. *Ernest J. Brown*, *Leonard J. Henzke, Jr.* and *Philip I. Brennan*, Attorneys, Department of Justice, also entered appearances for appellees.

Before ROBINSON, *Chief Judge*, and WRIGHT, TAMM, MACKINNON, ROBB, WILKEY, WALD, MIKVA, EDWARDS, and GINSBURG, *Circuit Judges*.

Opinion for the court filed by *Circuit Judge* MIKVA.

Dissenting opinion filed by *Circuit Judge* MACKINNON, in which *Circuit Judges* ROBB and WILKEY concur.

MIKVA, *Circuit Judge*: Taxation with Representation of Washington (Taxation) challenges the lobbying restrictions on certain nonprofit organizations required by Section 501(c)(3) of the Internal Revenue Code, 26 U.S.C. § 501(c)(3), as a violation of its First Amendment and equal protection rights. The whole of Taxation's argument well exceeds the sum of its parts. Taxation's case is weak if it is viewed solely as a First Amendment claim, because the Constitution does not require Congress to subsidize First Amendment activity. Taxation also has a weak case solely in terms of equal protection; Congress has vast leeway under the Constitution to classify the recipients of its benefits and to favor some groups over others. But a First Amendment concern must inform the equal protection analysis in this case. Courts must scrutinize with special care any act by Congress that facilitates the speech of one speaker over another, even when legislation is enacted in the dry, classification-ridden context of the Internal Revenue Code. By subsidizing the lobbying activities of veterans' organizations while failing to subsidize the lobbying of Taxation and other charitable groups, Congress has violated the equal protection guarantees of the Constitution. The district court erroneously rejected Taxation's constitutional challenge, and we accordingly reverse.

Because this case is complex, it may be useful to set out in advance the path that our reasoning follows. The opinion begins with an explanation of the internal revenue provisions at issue (cited as I.R.C. or by Section) and the discrimination established by those provisions. In the second part of the opinion, we explain why the statute's classifications must be given close judicial scrutiny. The third section then identifies and assesses the substantiality of the governmental interests said to justify the discrimination, and concludes that the statute

is unconstitutional. The final section of the opinion discusses the appropriate remedy for this violation and the need for a remand to the district court.

I. BACKGROUND

Taxation is a nonprofit charitable and educational organization that was formed to represent the general public on tax issues before Congress, the courts, and the executive branch.[1] After its incorporation in June 1977,

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[1] Taxation was created as the result of a merger between two other organizations, Taxation with Representation Fund (TWRF), a group devoted to courtroom advocacy, and Taxation with Representation (TWR), a group devoted to legislative activity. TWR had been incorporated in 1970 as a social welfare organization exempt from federal income taxes under Section 501(c)(4), 26 U.S.C. § 501(c)(4) [hereinafter cited as I.R.C.], but liable for unemployment taxes and ineligible for tax deductible contributions under I.R.C. § 170. In 1974, TWR was denied classification as a Section 501(c)(3) organization, and appealed unsuccessfully in *Taxation with Representation v. United States*, 585 F.2d 1219 (4th Cir. 1978), *cert. denied*, 441 U.S. 905 (1979).

Taxation apparently absorbed the functions of TWR after TWR lost its appeal, *see* Brief for Appellee United States (IRS Brief) at 4, and Taxation makes the same claims here that were rejected by the Fourth Circuit. Despite this close relationship between issues and parties, however, the government has not pleaded or argued that Taxation should be precluded by res judicata from litigating this case, and we decline to reach the question *sua sponte*.

Several litigants in this and other courts have also unsuccessfully raised issues related to those we decide here. *See, e.g., Christian Echoes National Ministry, Inc. v. United States*, 470 F.2d 849 (10th Cir. 1972), *cert. denied*, 414 U.S. 864 (1973) (religious organization challenged loss of exemption as result of substantial legislative activity as violation of free exercise clause); *Haswell v. United States*, 500 F.2d 1133 (Ct. Cl. 1974), *cert. denied*, 419 U.S. 1107 (1975) (taxpayer sued for refund on theory that his contributions to organization that engaged in extensive lobbying should have been deductible as charitable contributions); *Tax Analysts & Advocates v. Shultz*, 376 F. Supp. 889 (D.D.C. 1974), *app. dismissed mem. sub nom. Tax Analysts & Advocates v. Simon*, 512 F.2d 992 (D.C. Cir. 1975) (suit for declaratory judgment that legislative activity restrictions of Section 501(c)(3) were unconstitutional dismissed

Taxation applied to the Internal Revenue Service (IRS) for a declaration that it was an organization described in Section 501(c)(3).[2] Although Taxation otherwise qualified for tax-exempt status under that section, it did not meet the requirement that "no substantial part" of its activities consist of "attempting to influence legislation." The IRS specifically found that Taxation's "stated purposes include attempting to influence legislation, and legislative advocacy may constitute a substantial part of your activities." Notification of Adverse Ruling, February 14, 1978, Joint Appendix (J.A.) 48. As a result, Taxation was ineligible for several tax benefits provided by Section 501(c)(3), particularly the eligibility to receive tax-deductible contributions from donors.[3]

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because action barred by I.R.C. § 7421(a), barring suits to restrain or enjoin collection of taxes). Taxation with Representation was also a party to the latter suit, but its complaint was dismissed without prejudice. *See* 35 A.F.T.R.2d 1352.

[2] Section 501(c)(3) applies to:

> Corporations, and any community chest, fund, or foundation, organized and operated exclusively for religious, *charitable*, scientific, testing for public safety, literary, or *educational* purposes, or to foster national or international amateur sports competition (but only if no part of its activities involve the provision of athletic facilities or equipment), or for the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private shareholder or individual, *no substantial part of the activities of which is carrying on propaganda, or otherwise attempting, to influence legislation* (except as otherwise provided in subsection (h)), and which does not participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of any candidate for public office.

(emphasis added). Such organizations are exempt from taxation under the income tax subtitle unless such exemption is denied under I.R.C. §§ 502, 503, and 504.

[3] *See* I.R.C. § 170(c). Other tax benefits accruing to a § 501(c)(3) organization include exemption from federal social security taxes (FICA), I.R.C. § 3121(a), and exemption from federal unemployment taxes (FUTA), I.R.C. § 3306.

Taxation exhausted its administrative remedies, and then sought in May 1978 to overturn the IRS decision by bringing a declaratory judgment action under I.R.C. § 7428.[4] Upon consideration of cross-motions for summary judgment, the district court ruled for the defendants. Memorandum Opinion, January 31, 1979, J.A. 56-64. Taxation appealed the district court's decision, and a three-judge panel of this court decided on April 14, 1981, to uphold the trial court. On June 11, 1981, a majority of the full court of appeals voted to vacate the panel opinion and rehear the case *en banc*.

A. *The Statutory Scheme*

Before considering the issues presented by this case, it is first necessary to examine the classifications that are under review. Congress has excluded various types of organizations from the taxing provisions of the Code, and I.R.C. § 501 "is the linchpin of the statutory benefit system." *Simon v. Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26, 29 n.1 (1976). This section describes several dozen kinds of organizations that are exempt from federal taxation on the income they receive.

There are other important components of the tax benefits provided by Section 501 in conjunction with other provisions of the Code, however. The chief source of income for many of the nonprofit organizations described in the statute is private contributions. In order to encourage such giving, Congress has frequently provided that contributors to various Section 501(c) organizations may take a deduction based on the amount of the contribution. Because the Code imposes three general taxes on individuals—on income, gifts, and estates—the provisions

[4] I.R.C. § 7428 authorizes certain courts to issue declaratory judgments in appropriate cases relating to the status and classification of organizations under I.R.C. § 501(c)(3). Congress enacted this section of the Code as part of the Tax Reform Act of 1976, Pub. L. No. 94-455, 90 Stat. 1520.

allowing contributions to take these deductions appear in three separate portions of the Code. *See* I.R.C. §§ 170, 2055, 2522. Aside from this complexity, however, the general scheme is simple. Congress has accorded certain organizations a double benefit: exemption from taxes on their own income, and eligibility to receive contributions and gifts that are deductible from the donors' taxes as well. Throughout this opinion, tax exemption refers to the first benefit; and tax-deductibility to the second.

Every organization described in Section 501 enjoys some form of tax exemption, but only some are eligible to receive tax-deductible contributions. The status of any particular organization, of course, can only be ascertained by examining the other portions of the Code that provide deductions to the organization's donors. A further complication lies in the fact that the Code differentiates among those organizations eligible to receive tax-deductible contributions in terms of the uses to which the organization's income may be put. For the purposes of this case, the crucial distinction promoted by Section 501 is between organizations that may not receive tax-deductible contributions if they lobby substantially, and organizations that may receive such contributions even if they do.

Section 501(c)(3) organizations—sometimes simply called "charitable" organizations—are examples of the former. A donor to such an organization may deduct his contributions to it by virtue of the relevant provisions in the Code. See I.R.C. § 170(c)(2) (income tax deductions); I.R.C. §§ 2055(a)(2), 2106(a) (estate tax deductions); I.R.C. § 2522(a) (gift tax deductions).[5] The

[5] I.R.C. § 170(a) states the "general rule" that deductions shall be allowed for "any charitable contribution," defined in subsection (c). Section 170(c) defines "charitable contribution" as a contribution or gift to or for the use of

> (2) A corporation, trust, or community chest, fund, or foundation—

Code limits the amount of lobbying that may be conducted by the Section 501(c)(3) organization, however, whether or not the lobbying is related to its exempt purpose.[6] *See Slee v. Commissioner*, 42 F.2d 184 (2d

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> (A) created or organized in the United States or any possession thereof, or under the law of the United States, any State, the District of Columbia, or any possession of the United States;
>
> (B) organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes, or to foster national or international amateur sports competition (but only if no part of its activities involve the provision of athletic facilities or equipment), or for the prevention of cruelty to children or animals;
>
> (C) no part of the net earnings of which inures to the benefit of any private shareholder or individual; and
>
> (D) *which is not disqualified for tax exemption under section 501(c)(3) by reason of attempting to influence legislation*, and which does not participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of any candidate for public office.

(emphasis added). Similar language permits donors to make analogous deductions with respect to gift tax, I.R.C. § 2522(a)(2) (citizens or residents) and (b)(2) (nonresident aliens), and estate tax, I.R.C. §§ 2055(a)(3) (citizens or residents) and 2106(a)(2)(A)(ii) (nonresident aliens). Gift and estate tax deductions will soon become of less significance, however, in light of changes made by the Economic Recovery Tax Act of 1981, Pub. L. No. 97-34, 95 Stat. 172. As a final point, foundations may be deterred from contributing to an organization lacking § 501(c)(3) status because foundations and their managers are subject to tax if the foundation pays any amount "to carry on propaganda, or otherwise to attempt to influence legislation." I.R.C. § 4945(a) and (d)(1).

[6] *See, e.g.*, Rev. Ruling 67-293, 1967-2 *Cum. Bull.* 185 (nonprofit organization that operates facility for protection of stray animals does not qualify for exemption if a substantial part of its activities consists of attempts to influence state and local legislation related to welfare of animals); *Kuper v. Commissioner*, 332 F.2d 562, 563 (3d Cir. 1964) (upholding disallowance of deduction for contributions to local chapter of League of Women Voters because of "the general legislative program of the League"); *League of Women*

Cir. 1930). Section 501(c)(4) organizations, on the other hand, are exempt from income taxes even if they engage in substantial lobbying. These organizations are not eligible to receive tax-deductible contributions, however.[7]

Voters v. United States, 180 F. Supp. 379, 383 (Ct. Cl. 1960) (forum discussions by members in formulating position to be taken on questions of public interest held to constitute "preparation for the influencing of legislation" and were therefore legislative activities). "In practice, the *in terrorem* effect of the vague statutory proscription causes many charities to avoid most direct or indirect efforts to support or oppose legislation, even when the legislation is directly related to the charitable purposes for which they are organized and operated." Caplin & Timbie, *Legislative Activities of Public Charities*, 39 L. & CONTEMP. P. 183, 196 (Autumn 1975). This effect flowed from the inherent ambiguity of the statute. *See Krohn v. United States*, 246 F. Supp. 341, 347-48 (D.Colo. 1965) (meaning of "substantial" may vary with different types of organizations, and may turn on extent of the organization's other noncharitable activities as well as the extent of its charitable activities).

Congress sought to ease this problem somewhat in the Tax Reform Act of 1976, Pub. L. No. 94-455, 90 Stat. 1720, which allows certain public charities to be governed by new Code sections 501(h) and 4911. These allow the organization to devote a percentage of its resources to lobbying, and thus provide explicit dollar ceilings on lobbying rather than requiring the organization to adhere to the less certain "substantiality" test of Section 501(c)(3). All charities, however, continue to have their lobbying restricted under one standard or the other. "Taxation has not made, and does not plan to make, an election to be covered by the new provisions." Taxation Brief at 27 n.9. The new standard is accordingly not before us and is of little relevance to the discussion below. *But see* note 40 *infra*.

[7] Section 501(c)(4) applies to:

> Civic leagues or organizations not organized for profit but operated exclusively for the promotion of social welfare, or local associations of employees, the membership of which is limited to the employees of a designated person or persons in a particular municipality, and the net earnings of which are devoted exclusively to charitable, educational, or recreational purposes.

In contrast, other Section 501(c) organizations may receive tax-deductible contributions without regard to any lobbying limitation. Contributions to certain cemetery or burial companies, which are exempt under Section 501(c)(13), are deductible under Section 170(c)(5) without explicit statutory limitations concerning lobbying activities.[8] The same is true of contributions to the federal or state governments for exclusively public purposes. *See* Section 170(c)(1). Labor unions and business leagues are exempt under Sections 501(c)(5) and 501(c)(6) respectively, even if lobbying is their primary purpose. Contributions to such organizations, usually in the form of dues, generally are deductible only to the extent they are "business expenses."[9]

Analysis of where other Section 501(c) organizations fall in this scheme is complicated by the fact that IRS regulations may impose lobbying limitations even when the Code itself is silent. Fraternal beneficiary societies that operate through local lodges and meet certain other requirements, for example, are exempt under Section 501(c)(8).[10] Although contributions to such societies are

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[8] Such companies must be barred by their charters, however, from engaging in any other activities. I.R.C. § 170(c)(5).

[9] These sections thus track I.R.C. § 162(e), described in more detail at pp. 33-34 *infra*. Section 162(e) was enacted by Congress in 1962 to allow businesses to deduct the costs of lobbying directly related to legislation of interest to the taxpayer. If Section 501(c)(5) and (6) organizations use dues for lobbying, the dues are deductible by contributors only to the extent that the requirements of Section 162(e) are satisfied.

[10] Section 501(c)(8) and (10) provide for exemption of

> (8) Fraternal beneficiary societies, orders, or associations—
>
> (A) operating under the lodge system or for the exclusive benefit of the members of a fraternity itself operating under the lodge system, and

tax-deductible only if the contributions are to be used for the group's exempt purposes, the statute imposes no lobbying restriction for gift or income tax purposes, but does for estate tax purposes. *Compare* I.R.C. § 2055(a)(3) (explicit limitation for estate tax purposes) *with* I.R.C. § 2522(a)(3) (no restriction for gift tax purposes) *and* I.R.C. § 170(c)(4) (no restriction for income tax purposes). Treasury Regulations appear to fill this gap, however. The regulations provide that a charitable fund operated by a fraternal beneficiary society will not qualify for tax-deductible contributions under these provisions if the society is an "action organization," which includes organizations that engage in substantial lobbying. Treas. Reg. § 1.501(c)(3)-1(c)(3). *See, e.g., id.* § 25.2522(a)-1(a)(4) (gift tax deductions); *id.* § 1.170A-1(h)(5) (income tax deductions); *id.* § 2055(a) (estate tax deductions). Despite the impression given by the statute alone, then, fraternal beneficiary societies resemble Section 501(c)(3) organizations because they are barred by regulation from using tax-deductible contributions to engage in substantial lobbying.

Veterans' organizations, which are exempt under Section 501(c)(19), require even closer analysis than fraternal beneficiary societies. Unlike Section 501(c)(3) organizations, veterans' organizations are not subjected to a lobbying limitation as a prerequisite for receiving tax-deductible contributions. *See, e.g.*, I.R.C. § 170(c)(3)

(B) providing for the payment of life, sick, accident, or other benefits to the members of such society, order, or association or their dependents.

. . . .

(10) Domestic fraternal societies, orders, or associations, operating under the lodge system—

(A) The net earnings of which are devoted exclusively to religious, charitable, scientific, literary, educational, and fraternal purposes, and

(B) which do not provide for the payment of life, sick, accident, or other benefits.

(income tax deductions); I.R.C. § 2055(a)(4) (estate tax deductions); I.R.C. § 2522(a)(4) (gift tax deductions). Again, however, Treasury Regulations condition exemption from income taxes on whether such groups devote themselves "exclusively" to certain veterans' functions. *See* Treas. Reg. § 1.501(c)(19)-1. Moreover, the Treasury regulations seem to require that veterans' groups obey a lobbying limitation in order to enable their contributors to deduct donations for income tax purposes, *id.* § 170A-1(h)(5), if not for estate or gift tax purposes. In practice, however, veterans' organizations enjoy very different tax treatment. Counsel for the government candidly admitted during oral argument that the regulation governing deductibility of contributions for income tax purposes is not enforced with regard to veterans groups, and the IRS has stated that it will not challenge income tax deductions taken with regard to donations made to these groups. IRS Publication No. 78, Cumulative List of Organizations Described in Section 170(c) of the Internal Revenue Code of 1954 (1980).

B. *Consequences Suffered by Taxation*

The effect of the statutory scheme, with regulations engrafted, is that different exempt organizations receive disparate tax treatment depending on their lobbying activities. Section 501(c) runs the gamut from organizations that may lobby but receive no tax-deductible contributions, *e.g.*, Section 501(c)(4); organizations that may receive tax-deductible contributions but may not lobby, *e.g.*, Section 501(c)(3); and organizations that in practice may do both, *i.e.*, veterans' organizations under Section 501(c)(19). An organization such as Taxation may not receive tax-deductible contributions if it engages in "substantial" lobbying, but a qualifying veterans' organization may continue to receive tax-deductible contributions even if it lobbies as much and on as many issues as it chooses.

Perhaps as a result of this uneven treatment, veterans' groups such as the American Legion and the Veterans of Foreign Wars are active before Congress on a large number of different issues. The American Legion and its affiliates "have historically been among the most active lobbying organizations on the national scene." Troyer, *Charities, Law-Making, and the Constitution: The Validity of the Restrictions on Influencing Legislation*, 31 N.Y.U. INST. ON FED. TAX. 1415, 1439 (1973). Veterans' organizations have sought to influence legislation involving ratification of the Panama Canal treaties, Alaska national parks, national security issues, and elimination of Saturday mail delivery.[11] But a § 501(c)(3) charitable organization, such as one formed to promote health care, may not engage in substantial

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[11] *See, e.g., Inclusion of Alaska Lands: Hearings Before the Subcommittee on General Oversight and Alaska Lands of the House Committee on Interior and Insular Affairs*, 95th Cong., 1st Sess. 100 (1977) (statement of Delmar L. Shull, VFW); *Six-Day Mail Delivery: Hearings Before the House Committee on the Post Office and Civil Service*, 95th Cong., 1st & 2d Sess. 197 (1977-1978) (statement of Spike Brooker, Commander, Post 58, American Legion); *id.* at 216 (statement of Robert Copenbarger, VFW Post of El Paso); *Postal Service Act of 1977: Joint Hearings Before the Subcommittee on Postal Operations and Services and Subcommittee on Postal Personnel and Modernization of the House Committee on the Post Office and Civil Service*, 95th Cong., 1st Sess. 103 (1977) (statement of James F. O'Neil, publisher, American Legion magazine); *id.* at 106 (statement of Donald H. Schwab, director national legislative service, VFW); *Department of Defense Appropriations for 1977: Hearings Before a Subcommittee of the House Committee on Appropriations*, 95th Cong., 2d Sess., pt. 8, 685-710 (1978) (National Security Resolution adopted by the 59th National Convention of the American Legion supporting, inter alia, development of the B-1 bomber, M-X missile, cruise missiles, and reestablishment of selective service system). Veterans' organizations have even lobbied on matters that presumably have special interest to organizations such as Taxation. *E.g., Tax Simplification Proposals: Field Hearings Before the Subcommittee on Oversight of the House Committee on Ways and Means*, 95th Cong., 1st & 2d Sess. 234 (1977-1978) (statement of James Lund, VFW).

lobbying even when the legislation relates directly to its exempt purpose, say a bill for the construction of more hospitals.

Two preliminary arguments, which could be said to concern standing, should be addressed before turning to the central issues of this case. First, the government notes that because a charitable organization may be exempt from payment of income taxes under Section 501(c)(4) even if it engages in substantial lobbying, Section 501(c)(3) in no way constitutes a direct governmental interference with Taxation's lobbying. Supplemental Brief for Appellee United States (IRS Supp. Brief) at 14. The implication is that Taxation has suffered no injury from denial of Section 501(c)(3) status because the provisions of the Code "neither restrict Taxation's lobbying activities nor deny Taxation tax exempt status because of its planned activities." *Id.* As the description of the statutory scheme shows, however, disparate tax benefits depend on the specific statutory provision under which an organization is determined to be exempt from federal income tax. Taxation's lack of Section 501(c)(3) status causes it substantial disadvantages, notably exclusion from the IRS "Cumulative List" of organizations entitled to receive tax-deductible donations and foundation grants.[12] "[A]ppearance on

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[12] IRS Publication No. 78, Cumulative List of Organizations Described in Section 170(c) of the Internal Revenue Code of 1954 (1980) (periodically updated). "The listing of an organization in [the Cumulative List] signifies it has received a ruling or determination letter . . . stating that contributions by donors to the organization are deductible as provided in section 170 of the Code." Rev. Proc. 72-39, 1972-2 *Cum. Bull.* 818. "The Service has announced that, with narrowly limited exceptions, a donor may rely on the Cumulative List for so long as the beneficiaries of his largesse maintain their listing, regardless of their actual tax status." *Bob Jones University v. Simon*, 416 U.S. 725, 729 (1974). An organization's loss of this status, and "the crucial right to receive deductible contributions," is "tantamount to a death sentence." Caplin

the Cumulative List is a prerequisite to successful fund raising for most charitable organizations. Many contributors simply will not make donations to an organization that does not appear on the Cumulative List." *Bob Jones University v. Simon*, 416 U.S. 725, 729-30 (1974). It is therefore irrelevant to Taxation's case that it might lobby substantially and still be exempt from payment of income taxes under Section 501(c)(4).[13]

A second preliminary argument suggested by the government is related to the first. Because the chief effect of Taxation's refusal to comply with the "no substantial lobbying" clause of Section 501(c)(3) is that its contributors may not make tax deductible contributions, the government implies that Taxation is not the proper party to bring this case. IRS Supp. Brief at 19. "The attenuated effect on Taxation of denying a deduction to its potential contributors" is said not to constitute a "significant encroachment" or "serious infringement" of Taxation's right to lobby, *id.*, and "does not infringe Taxation's First Amendment rights," *id.* at 26. The argument too may be easily dismissed. Taxation has stand-

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& Timbie, *supra* note 6, at 195. "From the practical point of view, charities are not very much concerned about their own taxes. . . . It is, however, vital that they qualify as exempt charities in order that donors may deduct contributions made to them." Clark, *The Limitation on Political Activities: A Discordant Note in the Law of Charities*, 46 VA. L. REV. 439, 445-46 (1960).

[13] It is far from clear, however, that Taxation could seek tax-exempt status as a social welfare organization after denial of Section 501(c)(3) status. In 1976, Congress provided that a Section 501(c)(3) organization that forfeits its exemption by lobbying may not then qualify as a social welfare organization under Section 501(c)(4). See I.R.C. § 504. Congress enacted that provision to prevent a Section 501(c)(3) organization from "build[ing] up an endowment out of deductible contributions as a charitable organization and then us[ing] that tax-favored fund to support substantial amounts of lobbying as a section 501(c)(4) social welfare organization." S. REP. No. 938, pt. 2, 94th Cong., 2d Sess. 83, *reprinted in* [1976] U.S. CODE CONG. & AD. NEWS 4030, 4107-08.

ing to raise First Amendment claims on behalf of its members and supporters,[14] and it is clearly evident that Taxation will be harmed if its contributors cease giving it money. Regardless of the merits of its case, Taxation undoubtedly is an appropriate party to bring this action.

In short, Taxation has complained that Section 501(c) exposes the lobbying of various tax-exempt groups to discriminatory tax treatment and thereby violates Taxation's First Amendment and equal protection rights. The statutory provision effectively limits the ability of charitable organizations to present to legislators their views on legislation even when the legislation directly affects their charitable objects. There is a difference, of course, between showing that a statute has a discriminatory application and that it is unconstitutional. But Taxation has met the threshold requirement of demonstrating injury from the unequal application of a statute,[15] and it is to the constitutionality of that statute we now turn.

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[14] *See, e.g., NAACP v. Alabama*, 357 U.S. 449, 458 (1958) (an organization may assert, on behalf of its members, certain of their First Amendment rights); *Bates v. Little Rock*, 361 U.S. 516, 523 n.9 (1960). In *Buckley v. Valeo*, 424 U.S. 1, 12 (1976), the Court held that appellants had standing to challenge a limitation of $1,000 on individual contributions. The limitation "precludes most associations from effectively amplifying the voice of their adherents" and "is simultaneously an interference with the freedom of [their] adherents." *Id.* at 22 (quoting *Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957) (plurality opinion)).

[15] The government also makes the astounding argument that "discrimination" is not shown simply because of "disparities in the treatment accorded somewhat similarily situated taxpayers—particularly organizations exempt from tax under different provisions of the Code," and that "the federal tax laws pertaining to the lobbying activities of tax exempt organizations are not less 'neutral' now" than they were in 1959, before Congress enacted Section 162(e). IRS Supp. Brief at 24. The Supreme Court has soundly repudiated the contention that the demands of equal protection are met when the law applies equally to all within the statutory class:

II. The Appropriate Standard of Review

The starting point for our review must be determination of the appropriate standard to apply in reviewing appellant's constitutional claims. *See Harris v. McRae*, 448 U.S. 297, 322 (1980). We find that a high level of scrutiny is required because the lobbying restriction of Section 501(c)(3) constitutes a limitation on protected First Amendment activity, and because Taxation's equal protection argument therefore involves what is clearly a

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> application among the members of the class defined by Judicial inquiry . . . does not end with a showing of equal the legislation. The courts must reach and determine the question whether the classification drawn in a statute are reasonable in light of its purpose . . . .

McLaughlin v. Florida, 379 U.S. 184, 191 (1964). *See Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 541 (1942); *Rinaldi v. Yeager*, 384 U.S. 305, 308-09 (1966).

The dissent suggests that Congress has limited the lobbying and political activities of the nation's more prominent veterans' groups by incorporating them with federal charters that "uniformly contain provisions barring them from engaging in partisan political activity . . . ." Dissent at 33-34. This raises several questions of fact not addressed by the district court, including which of the nation's 22,000 veterans' organizations have such charters and whether these charters are actually enforced. The Veterans of Foreign Wars, for example, does not seem to have charter limitations on its political activities. *See* 36 U.S.C. § 111 *et seq.* (1976). Indeed, the VFW endorsed a presidential candidate in the 1980 election. *See* "The Republicans in Detroit; Veterans' Group Endorses Reagan," Washington Post, July 17, 1980, at A11. Moreover, the fact that some veterans' organizations are federally chartered does not distinguish them from section 501(c)(3) organizations, which may also have federal charters. *See, e.g.*, 36 U.S.C. § 1 (1976) (American National Red Cross); *id.* § 21 (Boy Scouts of America); *id.* § 271 (Future Farmers of America); *id.* § 371 (United States Olympic Committee); *id.* § 461 (National Safety Council); *id.* § 881 (Big Brothers of America). Indeed, the juxtaposition of veterans' organizations and section 501(c)(3) organizations throughout this title illustrates the essential similarity of these "private corporations established under Federal law." *Id.* § 1101.

fundamental right.[16] In analyzing the differential treatment challenged here, the question then must be whether a substantial governmental interest supports the classification and whether the classification is narrowly drawn to serve that interest.

A. *First Amendment Implications*

There is no question whatsoever that lobbying comes within the protection of the First Amendment. *See, e.g., California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508, 510-11 (1972); *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964); *Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 137-38 (1961). It is also beyond dispute that First Amendment freedoms are fundamental rights in our society. *See, e.g., Schad v. Borough of Mount Ephraim*, —— U.S. ——, 49 U.S.L.W. 4597, 4599 (1981); *Central Hudson Gas & Electric Corp. v. Public Service Comm'n*, 447 U.S. 557, 565 (1980). Were this a case in which the government sought to suppress the lobbying activities of Taxation directly, the appropriate level of scrutiny would be obvious. *See, e.g., N.A.A.C.P. v. Button*, 371 U.S. 415, 438-39 (1963); *Bates v. Little Rock*, 361 U.S. 516, 524 (1960).

First Amendment rights are not abridged, however, merely because the government refuses to subsidize those rights. In *Cammarano v. United States*, 358 U.S. 498 (1959), the Supreme Court upheld Treasury regulations that prohibited business deductions of lobbying expenses on the ground that governmental refusal to underwrite lobbying costs does not violate the First Amendment. *See*

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[16] Because the challenged classification is created by federal statutes, the equal protection guarantees of the Fifth Amendment rather than the Fourteen Amendment apply. *See, e.g., Buckley v. Valeo*, 424 U.S. 1, 93 (1976); *Weinberger v. Wiesenfeld*, 420 U.S. 636, 638 n.2 (1975); *Johnson v. Robison*, 415 U.S. 361, 364 n.4 (1974); *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954).

Harris v. McRae, 448 U.S. at 318 (whether Congress should subsidize the exercise of a fundamental constitutional freedom is "not a matter of constitutional entitlement").[17] For the same reasons, in *"Americans United" Inc. v. Walters*, 477 F.2d 1169, 1182 (D.C. Cir. 1973), *rev'd on other grounds sub nom. Alexander v. "Americans United" Inc.*, 416 U.S. 752 (1974), this court followed *Cammarano* in dismissing the appellants' claim that Section 501(c)(3)'s lobbying restriction violated the First Amendment on its face.[18]

Taxation makes a valiant attempt to avoid these holdings by claiming that the lobbying restriction of Section 501(c)(3) constitutes an "unconstitutional condition" on the exercise of its First Amendment rights. In *Perry v. Sindermann*, 408 U.S. 593, 597 (1972), the Supreme Court explained that "even though a person has no 'right' to a valuable governmental benefit and even though the

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[17] This statement was made in the context of only the first of several constitutional arguments rejected in *McRae*, that congressional restriction of the availability of certain medically necessary abortions under Medicaid impinged on the liberty interests protected by the Due Process clause as recognized in *Roe v. Wade*, 410 U.S. 113 (1973), and its progeny. See 448 U.S. at 312. The Court elaborated the theme later in the opinion: "It cannot be that because government may not prohibit the use of contraceptives . . . or prevent parents from sending their child to a private school . . ., government, therefore, has an affirmative constitutional obligation to ensure that all persons have the financial resources to obtain contraceptives or send their children to private schools." *Id.* at 318.

[18] In reversing, the Supreme Court held simply that Americans United's request for injunctive relief requiring reinstatement of its tax-exempt status was barred by the Anti-Injunction Act's prohibition against suits "for the purpose of restraining the assessment or collection of any tax." 416 U.S. at 757 (quoting I.R.C. § 7421(a)). The Court did not discuss the merits of appellants' case, other than noting that "[t]he consequences of the present regime for § 501(c)(3) organizations can be harsh indeed . . . ." *Id.* at 763 n.14. *See id.* at 782 (Blackmun, J., dissenting) (implying no opinion on merits of underlying controversy, but agreeing with court of appeals that case presented a substantial constitutional question).

government may deny him the benefit for any number of reasons," the government "may not deny a benefit to a person on a basis that infringes his constitutionally protected interests—especially, his interest in freedom of speech." *Accord, McDaniel v. Paty*, 435 U.S. 618, 626 (1978); *Pickering v. Board of Educ.*, 391 U.S. 563, 568 (1968); *Shelton v. Tucker*, 364 U.S. 479, 485-86 (1960); *Tygrett v. Barry*, 627 F.2d 1279 (D.C. Cir. 1980). *Cf. Speiser v. Randall*, 357 U.S. 513, 518 (1958) ("conditions imposed upon the granting of privileges or gratuities must be 'reasonable' "). The Supreme Court's decisions "have prohibited conditions on public benefits . . . which dampen the exercise generally of First Amendment rights, however slight the inducement to the individual to forsake those rights." *Elrod v. Burns*, 427 U.S. 347, 358 n.11 (1976) (plurality opinion). Taxation could enjoy the "public benefits" of Section 501(c)(3), provided it did not exceed a "substantial" level of lobbying. Because Section 501(c)(3) expressly conditions receipt of these benefits on a charity's willingness to refrain from a greater level of expression, Taxation contends, an unconstitutional condition has been placed on the furnishing of these tax benefits. "The Government has no obligation whatever to grant tax advantages to charities, but if it decides to do so, it cannot condition receipt of the advantages on a surrender of First Amendment rights." Brief for Appellant Taxation (Taxation Brief) at 21.

This argument has some strength, but we reject its premise. It is true that under certain conditions, the indirect aid granted through tax exemptions and deductions is the functional equivalent of a direct government payment.[19] *See Committee for Public Education and*

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[19] *See, e.g.*, Surrey & McDaniel, *The Tax Expenditure Concept and the Budget Reform Act of 1974*, 17 B.C. INDUST. & COMM. L. REV. 679 (1979); *cf.* Dodyk, *The Tax Reform Act of 1969 and the Poor*, 71 COLUM. L. REV. 758 (1971). The government accepts the

Religious Liberty v. Nyquist, 413 U.S. 756, 790-91 (1973) (declaring a tax benefit system invalid under the Establishment Clause); *Green v. Connally*, 330 F. Supp. 1150, 1156-57 (D.D.C.), *aff'd mem. sub nom. Coit v. Green*, 404 U.S. 997 (1971) (§ 501(c)(3) may not be used to benefit racially discriminatory private schools). "To deny an exemption to claimants who engage in certain forms of speech is in effect to penalize them for such speech. Its deterrent effect is the same as if the State were to fine them for this speech." *Speiser v. Randall*, 357 U.S. at 518. Taxation's argument would therefore be troublesome if it were the case that the government conditioned its provision of tax benefits on a charitable organization's waiver of First Amendment rights.[20]

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analogy between tax exemptions and direct governmental subsidies for purposes of this case, while cautioning that they have different characteristics. IRS Supp. Brief at 11 n.12. *See, e.g., Walz v. Tax Commission*, 397 U.S. 664 (1970), which held that a property tax exemption for religious organizations does not violate the Establishment Clause of the First Amendment, there being no "genuine nexus between tax exemption and establishment of religion." In *Marker v. Shultz*, 485 F.2d 1003 (D.C. Cir. 1973), this court held that tax exemptions for unions under Section 501(c)(5) did not constitute state involvement and prohibited support for union political activities. "A tax exemption is consistent with a 'benevolent neutrality' and government non-involvement with the exempted organization." *Id.* at 1006. *See Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 173 (1972) (state provision of necessary services such as police and fire protection, given to everyone without connotation of approval, does not constitute fostering or encouragement of racial discrimination).

[20] If this were the case, we would be forced to decide whether the restrictions on charities that received benefits under Section 501(c)(3) were both important and necessary to assure that the objects of the benefit program were attained. *See, e.g., Buckley v. Valeo*, 424 U.S. 1, 57 n.65 (1976) (Congress may condition candidates' receipt of federal financing on agreement to abide by limitations on overall campaign expenditures); *Civil Service Comm'n v. National Ass'n of Letter Carriers*, 413 U.S. 548 (1973) (upholding restriction of political activity by federal employees). Taxation

It is overly mechanistic, however, to suggest that the Section 501(c)(2) lobbying restriction actually is a condition on the receipt of tax benefits by charities. A group such as Taxation can easily structure itself along dual lines, under both Sections 501(c)(3) and 501(c)(4) of the Code, using the latter organization only for lobbying purposes.[21] Because Section 501(c)(4) organizations may lobby freely without losing the tax benefits for which they qualify, the use of both subsections accords a charitable organization full tax benefits *other than* the ability to lobby with tax-deductible contributions—and this distinction is entirely permissible under *Cammarano*. Charitable organizations are simply not required to waive their First Amendment rights in order to obtain public benefits —they simply may not lobby with tax-deductible contributions—and Taxation's "unconstitutional condition" argument must therefore fail.

As we observed at the outset, then, Taxation has no compelling claim based solely on the First Amendment.[22] We reject "the notion that First Amendment rights are somehow not fully realized unless they are subsidized by

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makes a strong argument that lobbying activities are not inconsistent with charitable purposes, *see, e.g.*, 2 RESTATEMENT (SECOND) OF TRUSTS § 374 (1959); IV R.W. SCOTT, THE LAW OF TRUSTS § 374 (3d ed. 1967), but our disposition of Taxation's First Amendment claim makes it unnecessary to consider this argument.

[21] As noted above, *see* note 1 *supra*, Taxation in fact originally followed this dual organizational structure. Although a Section 501(c)(3) organization may be barred from converting to a Section 501(c)(4) organization, *see* note 13 *supra*, nothing keeps such an organization from forming a *new* arm at any time and using nondeductible contributions made to it for lobbying purposes.

[22] Taxation does not challenge the proscription against "substantial lobbying" on grounds of vagueness, however, and that question is not considered in this opinion. *See* Borod, *Lobbying for the Public Interest*, 42 N.Y.U. L. REV. 1087, 1106-10 (1967); Clark, *supra* note 12, at 451-54; Troyer, *Charities, Law-Making, and the Constitution: The Validity of Restrictions on Influencing Legislation*, 31 N.Y.U. INST. ON FED. TAX 1415, 1456-62 (1973).

the State." *Cammarano v. United States*, 358 U.S. at 515 (Douglas, J., concurring). We also reject Taxation's 'unconstitutional condition' argument, because charitable organizations are governed by no conditions other than those upheld in *Cammarano*. Taxation has not shown that Section 501(c)(3)'s lobbying restriction abridges its First Amendment rights.

B. *Equal Protection Implications*

Our discussion of Taxation's First Amendment claims does not resolve the appropriate standard of review, because this is not a situation in which the government refuses impartially to subsidize *all* lobbying activities. Although the government need not subsidize the exercise of First Amendment rights, the question remains the appropriate standard of review when government subsidizes the exercise of First Amendment rights in a discriminatory fashion.[23]

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[23] It may be misleading to treat First Amendment and equal protection questions as though they were entirely separate, however. In cases such as this, there is a distinct interplay between these two constitutional principles. *See* Emerson, *The Affirmative Side of the First Amendment*, 15 GA. L. REV. 795, 802-03, 819 (1981) (discussing "an equal protection element in the first amendment guarantee" in the context of governmental subsidies for speech). "The peculiar identity of equal protection and first amendment analyses in differential access cases follows logically from the explicit constitutional designation of speech as fundamental and from the fact that the first amendment's proscription against censorship is itself simply a specialized equal protection guarantee." *Perry Local Educators' Ass'n v. Hohlt*, 652 F.2d 1286, 1296 (7th Cir. 1981). *See* Kavst, *Equality as a Central Principle in the First Amendment*, 43 U. CHI. L. REV. 20 (1975). The Supreme Court has recognized this interplay many times. *See, e.g., Carey v. Brown*, 447 U.S. 455, 460-61, 466-71 (1980); *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503, 510-11 (1969) (although classrooms are not public forums, rule prohibiting students from wearing armbands in protest of the Vietnam War struck down in part because school did not prohibit wearing of other symbols of political significance).

In *Speiser v. Randall*, 357 U.S. 513, 518 (1958), the Supreme Court held that discriminatory denial of tax exemptions for engaging in speech can impermissibly infringe First Amendment rights. *Speiser* concerned a California statute that conditioned property tax exemptions on the taking of a loyalty oath. The Court held that even though the statute involved merely the discriminatory denial of tax *exemptions*, and not the direct suppression of speech, a strict level of scrutiny was appropriate. "When we deal with the complex of strands in the web of freedoms which make up free speech, the operation and effect of the method by which speech is sought to be restrained must be subjected to close analysis and critical judgment in the light of the particular circumstances to which it is applied." *Id.* at 520. After conducting this close analysis, the Court concluded that California "clearly has no such compelling interest at stake" as would justify the operation of the statute. *Id.* at 529.[24]

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[24] Although it could be suggested that *Speiser* should be understood as striking down a statute "frankly aimed at the suppression of dangerous ideas," 357 U.S. at 519, and therefore inapposite here, that interpretation conflicts with the approach taken by the Court. *Speiser* was decided in 1958, soon after the decision in *Dennis v. United States*, 341 U.S. 494 (1951). The California statute was an attempt to enforce Article XX, § 19, of the California Constitution, which denied tax exemptions to any "person or organization which advocates the overthrow of the Government of the United States or the State by force or violence," *see* 357 U.S. at 516. The Court explicitly refused to reach the question of whether "California may deny tax exemptions to persons who engage in the proscribed speech for which they might be fined or imprisoned." *Id.* at 520. Instead, the Court applied strict scrutiny to the "procedural safeguards" and "burden of proof" established by the statute, *id.* at 521, and found that "this allocation of the burden of proof, on an issue concerning freedom of speech, falls short of the requirements of due process." *Id.* at 523. Although it may be correct that an underlying hostility to the California sedition law actually explains *Speiser*, *see Pennsylvania v. Nelson*, 350 U.S. 497 (1956), the Court itself was careful to decide the case in light of the strict scrutiny that must be applied to discriminatory tax treatment that implicates *any* First Amendment rights.

Although *Speiser* was decided a year earlier than *Cammarano*, nothing in the later case repudiates this ruling. Indeed, Justice Harlan's opinion for the Court in *Cammarano* carefully distinguished the earlier decision:

> *Speiser* has no relevance to the cases before us. Petitioners are not being denied a tax deduction because they engage in constitutionally protected activities, but are simply being required to pay for those activities entirely out of their own pockets, *as everyone else engaging in similar activities is required to do* under the provisions of the Internal Revenue Code. *Nondiscriminatory* denial of deduction from gross income to sums expended to promote or defeat legislation is plainly not " 'aimed at the suppression of dangerous ideas.' " 357 U.S., at 519. Rather, it appears to us to express a determination by Congress that since purchased publicity can influence the fate of legislation which will affect, directly, or indirectly, all in the community, *everyone in the community should stand on the same footing* as regards its purchase so far as the Treasury of the United States is concerned.

358 U.S. at 513 (emphasis added). The Court's emphasis on "nondiscriminatory" denial of benefits clearly distinguishes *Cammarano* from this case. *Cammarano* and *Speiser* are therefore consistent in requiring a strict standard of review for situations in which the government grants tax exemptions affecting First Amendment rights on a discriminatory basis.

This court's previous decisions explicitly adopt this reading of the relationship between *Speiser* and *Cammarano*. In *"Americans United" Inc. v. Walters*, 477 F.2d 1169, we held that the appellants' claim that Section 501(c)(3)'s lobbying restriction was unconstitutionally discriminatory raised a substantial constitutional question:

> *Cammarano*, while disposing of appellants' claim that first amendment rights are violated by the questioned statute, does not attempt to deal with possible discriminatory conduct. . . . Americans United, on the other hand, alleges just that discriminatory conduct found lacking in *Cammarano*. . . .
>
> If discrimination exists here it relates to the exercise of the most fundamental of rights, those protected by the first amendment . . . . This is neither a frivolous challenge nor one which, as of the writing of this opinion, has been foreclosed by the Supreme Court.

Id. at 1182-83.[25] *See Big Mama Rag, Inc. v. United States*, 631 F.2d 1030, 1034 & n.7 (D.C. Cir. 1980); *Haswell v. United States*, 500 F.2d 1133, 1147-48 (Ct. Cl. 1974), *cert. denied*, 419 U.S. 1107 (1975). Similarly, in *Community-Service Broadcasting of Mid-America, Inc. v. FCC*, 593 F.2d 1102 (D.C. Cir. 1978) (en banc), this court invalidated a requirement that noncommercial educational stations record and maintain copies of broadcasts on issues of public importance because

> where noncontent-based distinctions are drawn in a statute affecting First Amendment rights, the Supreme Court has held that the government interest served must be "substantial" and the statutory classification "narrowly tailored" to serve that interest if the statute is to withstand equal protection scrutiny.

Id. at 1122; *see id.* at 1111.

The case before us arguably differs from *Community Service* and even *Speiser* in the sense that it involves unequal levels of governmental subsidy of First Amendment rights, rather than a more intrusive governmental

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[25] It should be noted, however, that appellant in *"Americans United"* dropped its First Amendment claims on appeal. *See* 477 F.2d at 1181 ("at oral argument and in its Reply Brief it has narrowed its focus, and we believe wisely so, to the 'discriminatory' aspects of § 501(c)(3)").

restriction of those rights. The question apparently remains open whether courts may adopt a different level of scrutiny in cases of this sort, one that is somewhat less searching than the scrutiny applied when the government directly bans First Amendment expression. *See Perry Local Educators' Ass'n v. Hohlt*, 652 F.2d 1286, 1296-97 (7th Cir. 1981) (suggesting existence of sliding scale that "may vary with the particular right in question"). It is not necessary to decide whether, in view of the nature of the inhibition of Taxation's First Amendment rights, the appropriate level of review is the most stringent courts employ. It is certainly inadequate simply to ask whether the classifications at issue in this case "bear some rational relationship to a legitimate state end." *McDonald v. Board of Election Commissioners*, 394 U.S. 802, 809 (1969). Plainly, this case is not like *Cammarano*, in which the indirect burdens on First Amendment expression fell equally on all. Only a heightened scrutiny test fully accords with decisions in other cases.[26] Indeed, our analysis must be guided by *Buckley*

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[26] Judge Wisdom's comments in *Perry Local Educators' Ass'n v. Hohlt*, 652 F.2d 1286 (7th Cir. 1981), which concerned an analogous equal-access claim by a union to use a school board's internal mail system already being used by another union, are instructive:

> Despite the sweeping language of *Mosley* quoted above, other Supreme Court cases demonstrate that it is not invariably true that the government may never discriminate among constitutionally protected speech on the basis of its content or on the basis of the speaker, nor even that all such discrimination must always be scrutinized with equal strictness. Because a majority of the Court were unable to agree on any one rationale in some of these cases, it is not always easy to determine the appropriate standard of review. Even interpreting the cases in the way most favorable to the defendants, however, they require rigorous scrutiny to be applied here. . . . [S]peech restrictions keyed to the identity of the speaker are always scrutinized strictly: they almost invariably are not neutral with respect to the viewpoints they tend to disfavor.

Id. at 1294-95. *National Black United Fund, Inc. v. Devine*, No. 80-2101 (D.C. Cir. Oct. 20, 1981), which rejected a claim that re-

v. Valeo, 424 U.S. 1 (1976), in which the Supreme Court heard challenges to public financing provisions for presidential campaigns that provided far greater financial support to major-party candidates. In determining the standard of review appropriate under the Fifth Amendment, the Court started from precedents holding that direct "restrictions on access to the electoral process must survive exacting scrutiny." *Id.* at 94. *See, e.g., Lubin v. Panish*, 415 U.S. 709, 718 (1974) (indigent candidates may not be required to pay filing fees absent alternative means of ballot access); *Williams v. Rhodes*, 393 U.S. 23, 31 (1968) (appearance of minor parties on ballot may not be conditioned on whether they can obtain voter petitions with signatures totaling 15 percent of the number of ballots cast in the previous gubernatorial election). These "direct burdens" were much more restrictive than discriminatory funding of presidential candidates, the Court said, thereby implying that less than "exacting scrutiny" was appropriate. *Id.* But it is

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fusal to allow participation in the Combined Federal Campaign by a nonqualifying charity abridged appellant's First Amendment rights, is not to the contrary. The opinion observed that the mere "possibility" that the voices of some charities might be amplified at the expense of others did not "compel strict scrutiny of every Commission decision," slip op. at 12, because the regulations at issue were "intended to serve interests unrelated to the suppression of speech" and were thus subject to evaluation under a different standard. *Id.* at 13. By contrast, the Section 501(c) lobbying restriction clearly was intended to regulate speech. "A rule that substantially impairs the ability of certain groups to convey their message to a desired audience, on the other hand, effectively 'abridges speech' even if it is not intended to curtail public debate. . . . Government must bear a far heavier burden of justification for such a rule. Its content-neutral interests must be 'compelling' and it must demonstrate the absence of any 'less drastic means' for achieving its purpose." *Id.* In the case now before us, even the government acknowledges that "[t]he democratic process as a whole is jeopardized where the government provides undue support to any one lobbying faction, including the class of charitable organizations." IRS Brief at 29.

highly significant that the Court went on to analyze the discriminatory funding provisions in heightened scrutiny terms. "In any event, Congress enacted Subtitle H in furtherance of sufficiently important governmental interests," *id.* at 95, because "public financing as a means of eliminating the improper influence of large private contributions furthers *a significant governmental interest.*" *Id.* at 96 (emphasis added). The standard of review we select in this case must be no lower than that applied in *Buckley*, even though neither situation involves a "direct burden" on First Amendment expression.[27] *Cf. Citizens Against Rent Control/Coalition for Fair Housing v. Berkeley*, —— U.S. ——, 50 U.S.L.W. 4071, 4072 (1981) ("regulation of First Amendment rights is always subject to exacting judicial review.").

In short, we must apply a heightened level of scrutiny to the *discriminatory* treatment of lobbying activities given by Section 501(c) to different tax-exempt groups. It may be true that "in taxation, even more than in other fields, legislatures possess the greatest freedom in

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[27] *Buckley* is directly analogous to this case because Congress had approved greater public funding of First Amendment activities for some candidates as opposed to others. *Buckley* is also distinguishable, however, in the sense that it involved less restrictive discriminations than those at issue here. The Court noted that correlative restrictions on major-party candidates helped offset the lack of full financing given to minor parties: "But since any major-party candidate accepting public financing of a campaign voluntarily assents to a spending ceiling, other candidates will be able to spend more in relation to the major-party candidates." 424 U.S. at 99. No such offsetting advantages in Section 501 for charitable groups have been suggested here. The Court also observed in *Buckley* that the "risk of harm to minority interests is speculative" because the statute had yet to go into force, *id.* at 101, and cautioned that "we of course do not rule out the possibility of concluding in some future case, upon an appropriate factual demonstration, that the public financing system invidiously discriminates against nonmajor parties." *Id.* at 97 n.131. Again, in contrast, the Section 501(c)(3) restriction on lobbying by charitable organizations has been in effect since 1934.

classification," *Madden v. Kentucky*, 309 U.S. 83, 88 (1940), but that power is not unlimited.[28] As the Su-

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[28] The government argues that no Supreme Court cases have ever held that classifications in federal tax statutes are to be measured by more than a rational basis standard, IRS Supp. Brief at 30, and that it knows of no Supreme Court cases holding a federal tax statute invalid on equal protection grounds, *id.* at 31. *See San Antonio Independent School Dist. v. Rodriguez*, 411 U.S. 1, 41 (1973) (quoting *Madden v. Kentucky*); *Lenhausen v. Lake Shore Auto Parts Co.*, 410 U.S. 356, 360 (1973) (tax statute must be "palpably arbitrary" or "invidious" to violate equal protection guarantees). These cases do not involve First Amendment claims, however, which must be measured under a more searching standard. *Speiser v. Randall*, 357 U.S. at 518.

Federal tax statutes have been overturned, however—by the Supreme Court as well as lower federal courts. *E.g., National Life Ins. Co. v. United States*, 277 U.S. 508, 520 (1928) ("The suggestion that as Congress may or may not grant deductions from gross income at pleasure, it can deny to one and give to another is specious, but unsound"); *id.* at 534 (Brandeis, J., dissentnig) ("The Court has, of course, power to declare that the system of taxation established by Congress is unconstitutional"); *Moritz v. Commissioner*, 469 F.2d 466 (10th Cir. 1972), *cert. denied*, 412 U.S. 906 (1973) (dependent care deduction provision of Code impermissibly distinguished between unmarried male and unmarried female taxpayers); *cf. Golden Rule Church Ass'n*, 41 T.C. 719, 729 (1964) ("Although tax benefits may be matters of legislative grace . . . nevertheless, a denial of such benefits granted to others of essentially the same class may well rise to the level of an unconstitutional discrimination"). Moreover, state tax classifications have been struck down for incompatibility with equal protection principles. *E.g., Iowa-Des Moines National Bank v. Bennett*, 284 U.S. 239 (1931); *cf. In re Estate of Legatos*, 1 Cal. App.3d 657, 81 Cal. Rptr. 910 (1969) (equal protection proscribes arbitrary tax classifications). In addition, despite popular conceptions, Social Security is more akin to a tax than an insurance payment. *See Califano v. Goldfarb*, 430 U.S. 199, 217-18 (1977) (Stevens, J., concurring in judgment). The Supreme Court, applying an elevated but not its most stringent standard of review, has found certain gender-based classifications in the Social Security Act unconstitutional. See *Weinberger v. Wiesenfeld*, 420 U.S. 636 (1975); *Califano v. Goldfarb, supra. See generally* Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law*, 81 HARV. L. REV. 1439, 1461 (1968) ("A minimum demand of uniformly

preme Court held in *Police Dep't v. Mosley*, 408 U.S. 92, 99 (1972), there is a profound constitutional distinction between regulating all picketing and doing so selectively. "Because picketing plainly involves expressive conduct within the protection of the First Amendment, . . . discriminations among pickets must be tailored to serve a substantial governmental interest." *See Carey v. Brown*, 447 U.S. 455, 471 (1980) (reaffirming *Mosley*); *Califor-*

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reasonable rules in the management of public largesse is surely an unexceptional requirement of constitutional government").

The government suggests that *Moritz* is a case "of questionable vitality" in light of *Kahn v. Shevin*, 416 U.S. 351, 355 (1974), in which the Supreme Court held that Florida could provide a property tax exemption for widows but not for widowers without violating equal protection guarantees. IRS Supp. Brief at 31 n.25. The two cases are clearly distinguishable, however, and even in *Kahn* the statute was upheld after a level of review showing that the differential treatment had "a fair and substantial relation to the object of the legislation." *Id.* at 355 (*quoting Reed v. Reed*, 404 U.S. 71, 76 (1971)).

It is true that almost three decades ago, this court applied a rational basis test in upholding provisions of the Subversive Activities Control Act that denied tax exemptions or deductibility of contributions to any communist-action organization, regardless of its status under I.R.C. §§ 170 and 501.

> The sanctions with reference to tax exemptions and deductions, which are in Section 11 of the Act, forbid income tax deductions for contributions to a registered organization and deny income tax exemptions to such organizations. These allowances and denials fall within the field of congressional grace so long as a reasonable basis appears. This is too well established to require citation. We think these provisions clearly valid.

Communist Party of the United States v. Subversive Activities Control Board, 223 F.2d 531, 557 (D.C. Cir. 1954), *rev'd on other grounds*, 351 U.S. 115 (1956). But this case is of doubtful authority in view of *Speiser v. Randall*, which was decided four years later. *Compare Seasongood v. Commissioner*, 227 F.2d 907, 911 (6th Cir. 1955) (construing "propaganda" to reach only coloring or distortion of facts with an ulterior motive, and holding that a Good Government League was not disqualified from receiving deductible contributions because a different construction might violate First Amendment).

nia v. LaRue, 409 U.S. 109, 138 (1972) (Marshall, J., dissenting). The issue in this case therefore becomes whether the discriminatory framework of Section 501(c) serves a substantial governmental interest and whether the statute is narrowly tailored to serve that end.

III. Constitutionality of Differential Tax Treatment of Lobbying

When *Cammarano v. United States* was decided in 1959, its foundation was the congressional "neutrality" toward lobbying that existed at the time of the decision. *See* 358 U.S. at 513.[29] Since that time, Congress has departed substantially from the policy that government should not subsidize *any* lobbying. Taxation claims that the refusal to subsidize lobbying by Section 501(c)(3) organizations to the same extent that lobbying by other Section 501(c) organizations is subsidized constitutes a violation of equal protection.

On these facts, we agree. In the starkest terms, Congress has used the Code, perhaps inadvertently, to do one of two things. If veterans' organizations and organizations such as Taxation lobby on different sides of the same questions, Congres has chosen to favor one lobbyist on a particular issue over another. If veterans' organizations and Section 501(c)(3) organizations lobby on entirely distinct matters, Congress has ensured that greater attention will be devoted to some causes than others. Either outcome is unconstitutional unless an evaluation of the differential treatment in terms of the heightened

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[29] Indeed, the IRS in *Cammarano* argued against a business deduction for lobbying expenses on the ground that it "would upset the tax equilibrium which existed due to the then existing uniform prohibition against subvention." Garrett, *Federal Tax Limitations on Political Activities of Public Interest and Educational Organizations*, 59 Geo. L.J. 561, 583 & n.38 (1971) (citing Brief for Respondents at 12, *Cammarano v. United States*, 358 U.S. 498 (1959)).

level of scrutiny appropriate here demonstrates that there is an important governmental interest justifying the First Amendment preference. We turn to that question now.

A. *State Interests Furthered by the Classification*

Before the court can determine whether a substantial governmental interest supports the differential classification under review, it must first determine what interests are said to justify the classifications. Once these interests are identified, it can then be asked whether they are substantial. The pertinent classifications made in the Code are as follows.

1. *Business lobbying*

On rehearing, Taxation has dropped its equal protection challenge to the right of businesses to deduct lobbying expenses, Taxation Supp. Brief at 18 n.3, and it has not hitherto been necessary to explain these provisions of the Code. Nevertheless, the tax treatment of business lobbying is worthy of some attention because the reasons behind that treatment exemplify the sorts of governmental interests that we seek to identify in this section of the opinion.

I.R.C. § 162(e) permits the deduction of all "ordinary and necessary expenses" incurred in carrying on any trade or business, including lobbying costs incurred in "direct connection" with "legislation or proposed legislation of direct interest to the taxpayer."[30] There is a significant difference between profitmaking and nonprofitmaking entities, and it seems probable that each type lobbies with different motives. *See Haswell v. United States*, 500 F.2d at 1150. But the fact that a difference

[30] *See* note 9 *supra*. Section 162(e) also permits businesses to deduct indirect lobbying expenditures that are paid as dues to an organization of which the taxpayer is a member, such as a trade association.

exists does not by itself demonstrate the state interest behind the distinction.

The Senate Report explaining the addition of Section 162(e) in 1962 mentions several policy considerations, however. Lobbying is a cost of doing business, and the deduction of lobbying expenses permits a more accurate measurement of a business' net income. SEN. REP. NO. 1881, 87th Cong., 2d Sess. 22-23 (1962), *reprinted in* [1962] U.S. CODE CONG. & AD. NEWS 3304, 3325. The Report mentions three other explanations: the anomaly of allowing deductions for expenses incurred in presenting a business' viewpoint to administrative agencies and the executive branch but excluding the legislative branch; the importance of some legislation to a business' continued existence; and the desirability of encouraging business people to bring relevant information to the attention of Congress. *Id.*

2. *Veterans' organizations*

It is far more difficult to identify the governmental interest that is promoted by giving veterans' organizations a lobbying advantage over other Section 501(c) organizations. Just as there are differences between business and nonbusiness groups, of course, veterans groups may be distinguished from other Section 501(c) organizations. As noted above, however, the mere fact that differences exist between any two distinct entities does not demonstrate a substantial state interest that can justify discrimination in the exercise of constitutional rights. Descriptive terms alone have little relevance in identifying the governmental interest furthered by a differential statutory classification.

The government offers only two state interests that are said to justify preferential tax treatment of lobbying by veterans' organizations. First, veterans deserve substantial benefits and rewards in return for their service to the country. These benefits "compensate them for

disruption of civilian pursuits," assist in the "readjustment to civilian life," and help "make military service more attractive." IRS Supp. Brief at 44. Second, the government suggests that legislative activity by veterans' organizations is necessary in order to protect veterans' benefits from subversion by hostile forces. "Since these benefits are provided by legislatures, it is reasonable for Congress to allow veterans' organizations to engage in lobbying activities to preserve their benefits without risk of losing their tax deductible contributions." *Id.*

In identifying the governmental interests furthered by the tax treatment of these groups, however, it must be cautioned that our effort risks becoming a post hoc attempt to rationalize an otherwise inexplicable distinction in the Code. The government made no attempt in the district court to present affidavits or other evidentiary materials. Our identification of the relevant state interests must depend on the legislative history of the statute—but that history is sparse indeed.[31] Despite the apparently unambiguous distinction drawn in the statute, there is no indication in the legislative history of these sections that Congress intended to grant any tax-exempt organization a lobbying advantage over any others. In fact, the scant legislative history that exists is to the contrary, and suggests that Congress meant to treat the lobbying of all § 501(c) organizations equally.

Tax exemptions for religious, charitable, and educational organizations—and the correlative provisions per-

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[31] *See, e.g.*, Memorandum in Support of Cross-Motion by Defendants for Summary Judgment, October 28, 1978, at 5 (legislative history is "surprisingly sparse"); Garrett, *supra* note 29, at 564 ("The statutory history of this amendment is unclear as to the underlying rationale and scope of the prohibition"); Troyer, *supra* note 22, at 1421 (legislative history of the 1934 amendment "is sparse and unclear"); Note, *Regulating the Political Activity of Foundations*, 83 HARV. L. REV. 1843, 1845 (1970) ("neither the extent of the proscription nor its rationale has ever been clearly enunciated by Congress").

mitting taxpayers to deduct their contributions to such groups—are much older than similar treatment of veterans' organizations. Not until after World War One did Congress explicitly extend these benefits to a named veterans' group. Section 214(a) of the Revenue Act of 1921, ch. 136, 42 Stat. 227, accorded exempt status to posts of the American Legion, and it is greatly suggestive that Congress in 1921 viewed the American Legion no differently than any other charitable group. Senator Lodge, who proposed the extension in the Senate, considered it one "to which I think there can be no possible objection," 61 CONG. REC. 7066 (1921), and the lack of debate bears him out. As enacted, the predecessor section to I.R.C. § 170 simply added the American Legion to other organizations, by allowing deductions for

> Contributions or gifts made within the taxable year to or for the use of: (A) The United States, any State, Territory, or any political subdivision thereof, or the District of Columbia, for exclusively public purposes; (B) any corporation, or community chest, fund, or foundation, organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes, *including posts of the American Legion or the women's auxiliary units thereof*, or for the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private stockholder or individual; or (C) the special fund for vocational rehabilitation authorized by section 7 of the Vocational Rehabilitation Act.

Section 214(a)(11), 42 Stat. 241 (emphasis added). In the beginning, then, Congress not only expected that veterans' organizations and charitable groups would be treated equally, but it included both groups in the same subsection of the tax laws.

Congress extended this tax treatment to veterans' organizations generally in 1924. Section 214(a)(10), Rev-

enue Act of 1924, ch. 234, 43 Stat. 253. By this time, however, the statute had become considerably more detailed, and Congress created a new subsection for the veterans' groups. Contributions or gifts were deductible if given to

> (A) The United States, any State, Territory, or any political subdivision thereof, or the District of Columbia, for exclusively public purposes; (B) any corporation, or community chest, fund, or foundation, organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes, or for the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private shareholder or individual; (C) the special fund for vocational rehabilitation authorized by section 7 of the Vocational Rehabilitation Act; (D) posts or organizations of war veterans, or auxiliary units or societies of any such posts or organizations, if such posts, organizations, units, or societies are organized in the United States or any of its possessions, and if no part of their net earnings inures to the benefit of any private shareholder or individual; or (E) a fraternal society, order, or association, operating under the lodge system, but only if such contributions or gifts are to be used exclusively for religious, charitable, scientific, literary, or educational purposes, or for the prevention of cruelty to children or animals.

Section 214(a)(10), 43 Stat. 271. Again, however, the legislative history creates no inference that Congress sought to treat these groups differently than charitable organizations. The change was approved without comment on the floor in either house, *see* 65 CONG. REC. 2860, 7126 (1924), and received almost no mention in the reports accompanying the revenue act. *See* S. REP. NO. 398, 68th Cong., 1st Sess. 24 (1924); H.R. REP. NO. 844, 68th Cong., 1st Sess. 18 (1924). It is also noteworthy

that Congress enacted the same restrictions concerning earnings that inured to the benefit of private individuals for both types of organizations.

The lobbying limitation on charitable organizations was not enacted until 1934, and it is true that Congress inserted it only in the subsection of the statute dealing with charitable organizations. Section 23(o)(2), Revenue Act of 1934, 48 Stat. 690. This may simply have been a drafting oversight, however. Indeed, Senator Harrison, the chairman of the reporting committee, suggested that a more carefully drafted amendment would apply to "war organizations" as well:

> In considering that amendment, as I recall, the sentiment of the committee was that the provision should apply to *any* organization that is receiving contributions, the proceeds of which are to be used for propaganda purposes or to try to influence legislation.
>
> I called the attention of the experts to the fact that it seemed to me the proviso at the end of the second paragraph [the lobbying provision] *should apply to all four paragraphs.* Of course, *that would affect some war organizations*, but personally I see no difference between one organization that might be on one side of the fence getting contributions to propagandize and influence legislation and being permitted to proceed without interference, while at the same time preventing one that might have a different viewpoint from receiving or making use of contributions for the same purpose.

78 CONG. REC. 5861 (1934) (emphasis added). Senator LaFollette, another member of the Senate Finance Committee, agreed to the desirability of uniformity:

> I recognize . . . that there are certain types of organizations to which Congress and the executive branch of the Government might desire to encourage

> contributions. . . . In my opinion, it will not make a penny's worth of difference, so far as the contributions to these various organizations are concerned, *if they are all excluded from this immunity and all treated alike.* It is my judgment that we never shall get away from mistakes of administration and from decisions which may seem like favoritism until all contributions to organizations of this kind are made subject to the income tax.

Id. at 5959. *See id.* at 5861 (Senator Reed) (stating "no disagreement" with Senator Harrison's remarks). The amendment was eventually agreed to with the understanding that it would undergo redrafting by the conference committee. *See* 78 CONG. REC. 5959 (Senator Couzens) (amendment should "go to conference, and we can change the language if it is found to do any inequity"); *id.* (Senator Reed) ("if the amendment shall be agreed to we will have from now until the conference to study the subject and prepare better phraseology"). There is no explanation in the legislative history for the fact that the language of the enacted version was identical to that of the amendment as proposed.[32]

Congress has not indicated since 1934 that it specifically wishes to impose the lobbying restriction less than uniformly, other than by enacting a Code that articulates lobbying limitations in some provisions and not others.

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[32] The legislative scheme provides further support for this broad reading of the scope of the 1934 lobbying restriction. When the limitation was enacted, it was added to all relevant portions of the Code—the section establishing an exemption for charitable organizations and the three provisions permitting deduction of charitable contributions for income, estate, and gift tax purposes. See Revenue Act of 1934, Pub. L. No. 73-216, §§ 101(6), 23(o)(2), 406, 517, 48 Stat. 700, 690, 755, 760 (current version at I.R.C. §§ 501(c)(3), 170(c)(2)(D), 2055(a)(2), 2522(a)(2)). There was no intent—and no conceivable reason—to apply the lobbying restriction to some, but not all, of the primary tax benefits accorded exempt organizations.

No stated intent to discriminate among the lobbying activities of various tax-exempt organizations is shown by the 1972 addition of Section 501(c)(19), which created a new subsection for veterans' organizations in Section 501 to correspond with the separate veterans' subsection in Section 170. The legislative history suggests that this addition was only a technical, nonsubstantive amendment designed to correct the tax treatment of certain income by veterans' organizations inadvertently changed by the Tax Reform Act of 1969.[33] There is no indication that Congress meant to benefit veterans' organizations vis-a-vis other tax exempt organizations in any respect.[34] Most importantly, in explaining the effect of the new provision the Senate Report noted: "The committee does not intend for any expenditures for lobbying purposes to come under this exception." S. REP. No. 1082, 92d Cong., 2d Sess. 5

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[33] Until 1972, veterans' organizations were themselves exempt from taxation either as social welfare organizations under Section 501(c)(4) or as social clubs under Section 501(c)(7). Until 1969, organizations exempt under these categories were not subject to the unrelated business income tax. The Tax Reform Act of 1969 extended the unrelated business income tax to these categories, however. The 1972 law therefore created a new subsection for veterans' organizations, and added Section 512(a)(4) so that the income that a veterans' organization received from insuring its members and their dependents was not subject to the unrelated business income tax. *See* S. REP. No. 1082, 92d Cong., 2d Sess. (1972); H.R. REP. No. 851, 92d Cong., 2d Sess. (1972).

[34] The 1969 extension of the unrelated business income tax, for example, had been prompted by a desire "to avoid unequal treatment of the various types of tax-exempt organizations." H.R. REP. No. 413, pt. 1, 91st Cong., 1st Sess. 44 (1969) (amending I.R.C. § 511(a)(2)(A)). The 1972 revision was based on a similar concern. *See* 118 CONG. REC. 6033 (1972) (Rep. Mills) ("the veterans' organizations should not be taxed on this insurance income since other exempt organizations are permitted to insure their members without being taxed on the income from this activity"); *id.* (Rep. Matsunaga) (bill "would place veterans' organizations in exactly the same tax position as fraternal beneficiary associations now enjoy").

(1972), *reprinted in* [1972] U.S. CODE CONG. & AD. NEWS 3141, 3145.[35] It is therefore difficult to resist the conclusion that the tax preferences for lobbying by veterans' organizations reflect no policy, but simple lack of attention and consistency on the part of Congress and the IRS.

3. *Section 501(c)(3) charitable organizations*

In addition to searching for the governmental interests promoted by preferential treatment of lobbying by veterans' organizations, we must also examine the governmental interests behind restrictive treatment of lobbying by charitable groups and other Section 501(c)(3) organizations. As the government emphasizes, Congress, when it does not impinge impermissibly upon fundamental rights, "may address a problem 'one step at a time.'" IRS Supp. Brief at 40 (quoting *Jefferson v. Hackney*, 406 U.S. 535, 546 (1972)). "[T]he Constitution permits Congress to single out the greatest problems and legislate respecting the most serious abuses, while leaving less serious problems to a later date." IRS Supp. Brief at

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[35] The government argues that this language modifies only income received from insurance activities and set aside for charitable purposes under Section 512(a). IRS Supp. Brief at 38 n.33. Even if this reading is correct, great weight should still be given to the restriction. The new rule excluded from the unrelated business income tax all insurance receipts used or set aside for insurance benefits "or for religious, charitable, scientific, literary, educational, etc., purposes" *that were then identified* as "the purposes specified in sec. 170(c)(4)." S. REP. NO. 1082, at 5. These purposes, the Report said,

> are to include programs involving Americanism, youth activities, community activities, and information and educational programs relative to national security and foreign affairs for purposes of this provision.

Id. If these "purposes specified in sec. 170(c)(4" do not include lobbying when income is derived from one source, it is hard to see how they can include lobbying simply because income is derived from a different source.

42. *See Buckley v. Valeo*, 424 U.S. at 105; *Katzenbach v. Morgan*, 384 U.S. 641, 657 (1966). If the legislative history demonstrates a compelling reason for Congress to focus with particularity on special problems created by charitable lobbying with tax-deductible dollars, this might suffice to justify the differential treatment indicated in the Code sections before us.

Initially, it does seem far easier to discern the governmental interests promoted by the lobbying restriction on charitable organizations than those advanced by not extending this restriction to veterans' groups. Federal tax exemptions for religious, charitable, and educational organizations are as old as the Income Tax Act of 1894,[36] but there were no statutory limitations on the lobbying activities of exempt organizations for the next forty years. As described above, Congress amended the tax laws in 1934 to make clear that what are now Section 501(c)(3) organizations were not to engage in substantial lobbying activities. Unlike the legislation concerning veterans' organizations, the lobbying restriction was enacted only after a number of explanatory remarks by members of Congress, and this makes it seem relatively easy to identify the governmental interests promoted by the measure.

In discussing the amendment on the floor of the Senate, for example, Senator Harrison explained:

> the attention of the Senate committee was called to the fact that there are certain organizations which are receiving contributions in order to influence legislation and carrying on propaganda. The committee

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[36] Act of August 27, 1894, ch. 349, 28 Stat. 509 (held unconstitutional in *Pollock v. Farmers' Loan & Trust Co.*, 158 U.S. 601 (1895)). A similar exemption provision was included in the Income Tax Act of 1913, ch. 16, 38 Stat. 114, and subsequent revenue acts. The correlative provision permitting taxpayers to deduct contributions from their income taxes was enacted in 1917. War Revenue Act, ch. 63, 40 Stat. 297, 330 (now I.R.C. § 170).

> thought there ought to be an amendment which would stop that, so that is why we have put this amendment in the bill.

78 CONG. REC. 5959 (1934). Senator Reed, who was also a member of the reporting committee, addressed

> what we were trying to do by this amendment. There is no reason in the world why a contribution made to the National Economy League should be deductible as if it were a charitable contribution if it is a selfish one made to advance the personal interests of the giver of the money . . . .

Id. at 5861. These statements suggest that Congress acted to curb what it regarded as abuses by Section 501(c)(3) organizations then eligible to use tax-deductible contributions for lobbying activities. Based partly on these comments, the district court below articulated three "legitimate governmental purposes" served by the lobbying restriction: "assurance of governmental neutrality with respect to the lobbying activities of charitable organizations; prevention of abuse of charitable lobbying by private interests; and preservation of a balance between the lobbying activities of charitable organizations and those of non-charitable organizations and individuals." Memorandum Order, J.A. 62.

It would be grossly simplistic to read too much into these comments, however. Legislation is never passed in a vacuum, and any genuine understanding of its purpose must take some account of what conditions were before it was enacted. There is an early history of restrictions on political activity by charitable organizations well preceding the 1934 statutory change. In 1919, for example, the Treasury provided by regulation that "associations formed to disseminate controversial or partisan propaganda are not educational within the meaning of the statute." Treas. Reg. 45, art. 517 (1919), in T.D. 2831, 21 TREAS. DECS. INT. REV. 285 (1920). The principle

was successfully applied in several cases before the Board of Tax Appeals in the 1920s,[37] and was central to Judge Learned Hand's opinion in *Slee v. Commissioner*, 42 F.2d 184 (2d Cir. 1930):

> Political agitation as such is outside the statute, however innocent the aim, though it adds nothing to dub it "propaganda," a political word used to decry the publicity of the other side. Controversies of that sort must be conducted without public subvention; the Treasury stands aside from them.

Id. at 185. Obviously, because of the close connection in the statute between veterans' organizations and other charitable groups, the regulations and judicial pronouncements presumably applied to veterans' organizations too.

These restrictions on political activity by charitable organizations prior to 1934 make it difficult to interpret the congressional intent behind the 1934 amendment with total confidence. "In view of the existing case law on the subject, it is not clear what the proponents of the legislation sought to accomplish." Clark, *The Limitation on Political Activities: A Discordant Note in the Law of Charities*, 46 VA. L. REV. 439, 447 (1960). The addition to the statute may have been meant simply to codify preexisting regulation of charitable organizations. To a

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[37] *See, e.g., Herbert E. Fales*, 9 B.T.A. 828 (1927) (evidence indicated that Scientific Temperance Federation, Massachusetts Anti-Saloon League, Massachusetts Anti-Cigarette League, and International Reform Bureau were formed to disseminate controversial propaganda); *Sophia G. Coxe*, 5 B.T.A. 261 (1926) (League to Enforce Peace not exclusively charitable). *See generally Jackson v. Phillips*, 96 Mass. (14 Allen) 539 (1867) (trust to promote "women's rights" not charitable); *Bowditch v. Attorney General*, 241 Mass. 168, 134 N.E. 796 (1922) (trust for promotion of temperance held charitable). The later case of *Slee v. Commissioner*, 42 F.2d 184 (2d Cir. 1930), was widely followed. *E.g., James J. Forstall*, 29 B.T.A. 428, 436 (1933); *Leubuscher v. Commissioner*, 54 F.2d 998, 1000 (2d Cir. 1932); *Weyl v. Commissioner*, 48 F.2d 811, 812 (2d Cir. 1931).

great extent, however, commentators hold the view that the 1934 enactment was a reform measure intended to liberalize the case law.[38] It appears that the proponents wanted to restrict selfishly motivated political agitation, meant to secure some personal interests of the donor, without providing that all political activity by charitable organizations was inherently improper. The breadth of the lobbying restriction has therefore been attributed primarily to the inability of Congress to draft a more "appropriate" test.[39] This theory finds support in the debates. Senator Reed, who was also a member of the Senate Finance Committee, observed on the floor that "we found great difficulty in phrasing the amendment. I do not reproach the draftsmen. I think we gave them an impossible task; but this amendment goes much further than the committee intended to go." 78 CONG. REC. 5861 (1934).

Whatever the strength of these views, they strongly suggest that the 1934 amendment applying only to charitable organizations cannot automatically be presumed to show that Congress addressed only "the phase of the problem which seem[ed] most acute to the legislative mind." *Williamson v. Lee Optical Co.*, 348 U.S. 483, 489

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[38] *See, e.g., Seasongood v. Commissioner*, 227 F.2d 907, 910 (6th Cir. 1955) (courts "have also applied the principle, that the section being remedial must be liberally construed"); Clark, *supra* note 12, at 447; Borod, *supra* note 22, at 1113 (1934 amendments "were intended to some extent to liberalize, rather than restrict, the administration of the revenue laws in regard to charitable organizations"); Caplin & Timbie, *supra* note 6, at 185 ("A persuasive case can be made" that "Congress intended a more limited proscription than a literal reading of the statute would suggest"). The restriction has been widely excoriated. *E.g.*, Note, *The Tax Code's Differential Treatment of Lobbying Under Section 501(c)(3)*, 66 VA. L. REV. 1513, 1525 (1980); Note, *Political Activity and Tax Exempt Organizations Before and After the Tax Reform Act of 1969*, 38 GEO. WASH. L. REV. 1114, 1136 (1970) (restriction is "obscure in origin, uncertain in application, and perhaps harmfully outmoded").

[39] Garrett, *supra* note 29, at 564; *see* Clark, *supra* note 12, at 447.

(1955). If the 1934 amendment was intended to liberalize the case law, the fact that it applied only to charitable organizations would suggest that Congress meant to treat lobbying by such groups *less* stringently than similar activity by other groups.[40] The legislative history provides no positive assurance for this proposition, of course, but it also fails utterly to demonstrate that Congress restricted the lobbying of charitable organizations because of special problems arising in that area alone.

B. *Substantiality of the State Interests*

If there are any other governmental interests furthered by disparate tax treatment of lobbying activities by tax-exempt organizations and other groups, they have not been identified in the legislative history or by the parties in this case. The question now becomes whether any of these interests are sufficiently substantial to justify the differential tax treatment, and if so whether the statute is narrowly tailored to meet them.

The preceding discussion clearly identified governmental interests that justify allowing businesses to deduct the cost of business lobbying. Because the government assesses taxes on net business income, such deductions are necessary in order to permit accurate measurement of the cost of producing goods and services. In contrast, tax-exempt organizations have no comparable need for a realistic reflection of income. The governmental interest in distinguishing between these two kinds of organizations is a substantial one, and the Code's differentiation between businesses and Section 501(c)(3) organizations is both

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[40] Some additional support for this argument may lie in the enactment of Section 501(h) in 1976, *see* note 6 *supra*, which liberalized the rules governing lobbying by charitable organizations by freeing them from the uncertain application of the "substantiality" test. *See Hearings on Legislative Activity by Certain Types of Exempt Organizations Before the House Comm. on Ways and Means*, 92d Cong., 2d Sess. 1 (1972); Geske, *Direct Lobbying Activities of Public Charities*, 26 TAX LAWYER 305 (1972).

relevant to that interest and narrowly tailored to serve it.[41]

The addition of Section 162(e) has import in assessing the strength of the government's analysis in this case, however, because it demonstrates that lobbying is not an inherently improper activity concerning which Congress seeks as much neutrality as possible. Section 162(e) unquestionably demonstrates a decision by Congress to depart from the posture of neutrality toward lobbying that once was affirmed by *Cammarano*.[42] It therefore un-

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[41] The same reasoning supports the deductibility of contributions to unions and business leagues under Sections 501(c)(5) and 501(c)(6). As noted above, such contributions are deductible only to the extent they are "business expenses" under Section 162. *See* note 9 *supra*.

It may be noted in passing, however, that some of the governmental concerns articulated in the reports accompanying the enactment of Section 162(e) are of doubtful constitutional validity. Neither the importance of some legislation to a business' existence nor the desirability of encouraging business people to bring relevant information to the attention of Congress offers a clear and substantial justification for subsidizing lobbying by particular groups over others. *See* S. REP. No. 1881 at 22-23, [1962] U.S. CODE CONG. & AD. NEWS at 3325.

[42] *See, e.g.*, Garrett, *supra* note 29, at 583 ("By reversing the Supreme Court, the 1962 amendment to section 162(e) indicates a changed congressional position on subvention, makes defense of the policy difficult since it is no longer uniformly applied, and raises serious first amendment issues regarding whether the restrictions applied to section 501(c)(3) and 170(c)(2) organizations operate discriminatorily to suppress constitutional freedoms"); *Influencing Legislation by Public Charities: Hearings Before the House Comm. on Ways and Means*, 94th Cong., 2d Sess. 68 (1974) (ABA statement):

> [N]ow that direct business lobbying has become a deductible activity under § 162(e), the former "neutral posture of the tax law with respect to lobbying" (see Cammarano v. United States, *supra*) has been upset in favor of the business interests as opposed to the charitable organizations.

The reports accompanying section 162(e) also suggest that federal policy is not neutral, but is one of encouraging business participa-

dercuts any suggestion that because efforts to influence legislation present "well-recognized dangers to representative Government," *Haswell v. United States*, 500 F.2d at 1150, such efforts should never be subsidized through tax deductions.[43] The first of the three governmental interests given by the district court for the restriction on lobbying by charitable organizations—the preservation of governmental neutrality concerning lobbying—therefore disappears.

The second such interest, prevention of abuse of charitable lobbying by private interests, also fails to pass constitutional muster under a close scrutiny test. There is no evidence whatsoever that the lobbying of veterans is less subject to abuse by private interests than that of other Section 501(c) groups. Thus, although this interest is doubtless valid, it cannot be suggested that Section 501(c) has been tailored to meet it. We decline the government's invitation to infer that because Congress did not apply the lobbying exemption to all exempt organizations, it saw no problem in according special tax benefits to veterans' organizations despite their lobbying activities. The legislative history discussed above provides no support for such an inference.

The final interest said to require special treatment of lobbying by charitable organizations—"preservation of a

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tion in the legislative process. S. REP. No. 1881 at 23, [1962] U.S. CODE CONG. & AD. NEWS at 3325.

[43] The Supreme Court has recognized that departures from uniform pursuit of an asserted governmental purpose raise doubts as to whether that purpose is genuinely important. *See, e.g., Metromedia, Inc. v. San Diego*, —— U.S. ——, ——, 49 U.S.L.W. 4925, 4933 (1981) ("exceptions to the general prohibition are of great significance in assessing the strength of the city's interest"); *Schad v. Borough of Mount Ephraim*, —— U.S. at ——, 49 U.S.L.W. at 4600 n.14 ("The Borough's decision to permit live entertainment as a nonconforming use only undermines the Borough's contention that live entertainment poses inherent problems that justify its exclusion").

balance between the lobbying activities of charitable organizations" and those of other groups—also fails to meet the heightened standard applicable here. There is absolutely no evidence that Congres sought to achieve this objective when it enacted the lobbying restriction in 1934. Even if charities before that time could lobby with deductible contributions, there is no indication that charities had become so powerful that they threatened to drown out the voiecs of those whose lobbying was not similarly subsidized.[44] Moreover, had this been the intent of Congress, courts would consider such a purpose constitutionally illegitimate. "[W]here, as here, the legislature's suppression of speech suggests an attempt to give one side of a debatable public question an advantage in expressing its views to the people, the First Amendment is plainly offended." *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 785-86 (1978); *see id.* at 790-91. "[T]he concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment." *Buckley v. Valeo*, 424 U.S. at 48-49. The governmental purposes said to require special restrictions on lobbying by Section 501(c)(3) organizations are

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[44] Members of this court have suggested that in First Amendment cases judges should consider only the actual governmental purposes behind challenged legislation rather than possible or hypothetical ones. *See, e.g., Community-Service Broadcasting of Mid-America, Inc. v. FCC*, 593 F.2d at 1128 (Robinson, J., concurring in part) ("courts cannot rely upon aims that apparently never crossed the minds of the legislators, particularly when confronted by the possibility of danger to a fundamental interest") (footnote omitted); *id.* at 1146 & n.51 (Leventhal, J., concurring) ("Courts engaged in the careful scrutiny of legislation . . . are not free to conjecture an important governmental interest when one has not surfaced in congressional deliberations.") *Cf. Califano v. Goldfarb*, 430 U.S. 199, 212-17 (1977) (plurality opinion) (examining legislative history of challenged statute to determine "actual purpose" of discrimination, and refusing to accept objectives advanced by appellants because Congress had given no attention to them).

therefore either illegitimate, insubstantial, or inadequately promoted by a statute that is not narrowly tailored to serve them.

Moreover, the Code's discriminatory treatment of lobbying by veterans' organizations does not even satisfy the test of rationality, much less the heightened level of scrutiny appropriate here. The legislative history of the tax exemptions accorded veterans demonstrates absolutely no governmental interest whatsoever that is served by allowing such groups to conduct substantial lobbying with tax-deductible contributions. The post hoc rationales suggested by the government are constitutionally illegitimate. Allowing veterans to lobby freely in order to protect their benefit programs does not explain why other groups that may be equally dependent upon Congress for support should have less access to the legislature. Other tax-exempt groups, such as universities, are equally beset by hostile forces but are nevertheless limited by Section 501 (c) (3) in the amount of lobbying they may do to maintain or increase their level of congressional funding. Finally, it emphatically does not follow that because veterans deserve special benefits in recognition of their service to the country, they are entitled to greater First Amendment rights than other citizens. The First Amendment proscribes governmental efforts to favor one speaker over another. *See, e.g., Carey v. Brown*, 447 U.S. at 462-63; *First National Bank of Boston v. Bellotti*, 435 U.S. at 784-85; *Police Dep't v. Mosley*, 408 U.S. at 96. "First Amendment rights may not be used as a type of 'currency' to reward those who have rendered service to the nation or who are otherwise determined to be worthy." Taxation Supp. Brief at 19.

In short, the Code's classification according tax benefits to lobbying by some tax-exempt groups but not others does not withstand constitutional scrutiny. No identifiable governmental interests justify the differential tax treatment of lobbying by veterans' groups and Section

501(c)(3) organizations. The distinctions and interests suggested by the government are either completely unrelated to any substantial purpose, or reflect only illegitimate governmental goals. "[I]t has been open to courts since the enactment of the Fourteenth Amendment to determine, if on the particular facts they must, that a discriminaion reflects *no* policy, but simply arbitrary and capricious action." *Baker v. Carr*, 369 U.S. 186, 226 (1962) (emphasis by the Court).

C. *The Unconstitutionality of These Classifications*

Because no substantial purpose justifies the disparate treatment of lobbying by Section 501(c) when that statute is subjected to careful scrutiny, the discriminatory treatment of Taxation's First Amendment activities constitutes a denial of equal protection, and is unconstitutional. Even so, this remains a troublesome case. Congress has enormous leeway in classifying the recipients of its benefits and funds, and in favoring certain groups over others.[45] If Congress provided office space and government surplus furniture to veterans' organizations, for example, as Congress clearly has authority to do, it would indirectly facilitate the lobbying of such groups by freeing up funds that other organizations such as Taxation would have to spend for rent and supplies. Moreover, Congress occasionally appropriates grants for certain groups with the understanding that the money may be used for public education, litigation, and lobbying.[46]

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[45] Article I, Section 8 of the Constitution empowers Congress to lay and collect taxes and expend public funds for the general welfare. Its powers under this clause are broad. *See Steward Machine Co. v. Davis*, 301 U.S. 548 (1937).

[46] *See, e.g.*, 42 U.S.C. § 2996f(a)(5) (1980) (Legal Services Corporation prohibited to use funds to influence passage or defeat of federal or state legislation except in delineated circumstances); 42 U.S.C. § 5653 (1980) (National Institute for Juvenile Justice and

Similarly, in other contexts such as National Public Radio and Television, the government directly funds First Amendment activity that by necessity excludes some speakers and favors others. *See* Emerson, *The Affirmative Side of the First Amendment*, 15 GA. L. REV. 795, 823-28 (1981); Note, *Freeing Public Broadcasting from Unconstitutional Restraints*, 89 YALE L.J. 719 (1980) (arguing that direct state subsidy of the Public Broadcasting Service violates the First Amendment).

We suggest nothing concerning the constitutionality of any of these grants and programs, which of course are not before us. Nevertheles, it may be observed that certain principles do distinguish many of these programs from the lobbying preference now given to veterans. First, it is well established that although government may not directly facilitate the speech of one person over that of another, government too is a rightful participant in the "marketplace of ideas."[47] Examples such as the

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Delinquency Prevention authorized to prepare studies and recommendations and disseminate information to individuals, agencies, and organizations concerned with prevention and treatment of juvenile delinquency).

[47] *See, e.g., Greer v. Spock*, 424 U.S. 828, 838 n.10 (1976); *Toward a Gayer Bicentennial Committee v. Rhode Island Bicentennial Foundation*, 417 F. Supp. 632, 638-39 & n.9 (D.R.I. 1976) (state can inquire whether applicants proposed use of public area comports with theme specified by government). The government also possesses editorial powers when it acts as the proprietor of an entity with press rights. *See Avins v. Rutgers, State Univ. of New Jersey*, 385 F.2d 151 (3d Cir. 1967), *cert. denied*, 390 U.S. 920 (1968) (state university law review had editorial prerogative of rejecting article). It may be difficult, of course, to distinguish between government-sponsored speech and private speech in close cases. *Compare Bonner-Lyons v. School Committee*, 480 F.2d 442 (1st Cir. 1973) *with Buckel v. Prentice*, 572 F.2d 141 (6th Cir. 1978). *See generally Perry Local Educators' Ass'n. v. Hohlt*, 652 F.2d 1286, 1292-96 (7th Cir. 1981); Emerson, *supra* note 23, at 831, 837; Shiffrin, *Government Speech*, 27 U.C.L.A. L. REV. 565, 577-88 (1980); Yudof, *When Governments Speak: Toward a Theory of Government Expression and the First Amendment*, 57 TEX. L. REV. 863, 908-12 (1979).

Voice of America and the press offices of executive departments and agencies illustrate the government's authority to communicate with its citizens and the people of the world. Under some conditions, it is possible that the government could also subsidize private groups or speakers in an effort to get its own message across. *Compare Community-Service Broadcasting of Mid-America, Inc. v. FCC*, 593 F.2d at 1110 n.17, *with* Shiffrin, *Government Speech*, 27 U.C.L.A. L.REV. 565 (1980). Second, the very nature of government may dictate that it alone can provide certain forums for First Amendment expression, from parks with rostrums to a national public television system. First Amendment principles apply to these forums, of course, but they require that access be nondiscriminatory [48] rather than that government not

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[48] *See, e.g., Police Department v. Mosley*, 408 U.S. 92 (1972); *Healy v. James*, 408 U.S. 169 (1972); *Cox v. Louisiana*, 379 U.S. 536 (1965); *Hague v. CIO*, 307 U.S. 496 (1939). Similar principles govern the time, place, and manner restraints that may be applied to First Amendment expression without violating the Constitution. *See, e.g., Grayned v. City of Rockford*, 408 U.S. 104, 116 (1972) ("The crucial question is whether the manner of expression is basically incompatible with the normal activity of a particular place at a particular time"); *Kovacs v. Cooper*, 336 U.S. 77 (1949) (loudspeakers); *Cox v. New Hampshire*, 312 U.S. 569 (1941) (parades).

In certain situations, the fact that government has created the forum seems to permit some discrimination among speakers that is directed toward content but neutral with regard to viewpoint. *See, e.g., FCC v. Pacifica Foundation*, 438 U.S. 726 (1978) (FCC can regulate use of certain words on airwaves); *Lehman v. City of Shaker Heights*, 418 U.S. 298 (1974) (plurality opinion) (municipal bus system can permit commercial but not political advertising). *Compare Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546 (1975) (granting claim for access to municipal theatre by promotor of controversial production) *with Young v. American Mini Theatres, Inc.*, 427 U.S. 50 (1976) (plurality opinion) (upholding restrictive zoning ordinance for theatres exhibiting sexually explicit films). *See generally* Karst, *Public Enterprise and the Public Forum*, 37 OHIO ST. L.J. 247 (1976); Comment, *Access to State-Owned Communications Media—the Public*

create the facilities at all. Finally, it is possible that a thorough constitutional analysis of certain programs might well demonstrate that although the government program *does* discriminatorily subsidize certain speakers, the state interest is sufficiently compelling that the discrimination is not unconstitutional. Until other programs that arguably subsidize First Amendment rights in a discriminatory fashion come before us, however, it would be injudicious to undertake any elaborate constitutional analysis of what might now seem analogous situations.

What does remain crucially important, however, is that none of these possible justifications can uphold discriminatory tax treatment of lobbying by different kinds of Section 501(c) organizations. There is a brightline distinction between direct legislative promotion of speech, and indirectly facilitating speech by providing an organization with other kinds of support. It cannot conceivably be argued that the lobbying preference for veterans' organizations demonstrates the government's attempt to get its own message across to the public, because the Code provides open-ended subsidization of any position that these groups choose to espouse even if those positions directly challenge the policy of the government.[49] With-

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Forum Doctrine, 26 U.C.L.A. L.REV. 1410 (1979); Note, *The Public Forum: Minimum Access, Equal Access, and the First Amendment*, 28 STAN. L.REV. 117 (1975). Other standards may be appropriate where the "forum" is not public at all. *See United States Postal Service v. Council of Greenburgh Civic Ass'ns.* —— U.S. ——, 49 U.S.L.W. 4813 (1981) (upholding statute prohibiting deposit of unstamped "mailable" matter in officially approved mailboxes).

[49] As noted earlier, *see* note 11 *supra*, veterans' organizations have not restricted their lobbying to issues of particular importance to veterans, such as veterans' benefit programs. A particularly notable example is the lobbying of many veterans' organizations against the proposed Panama Canal treaties. *See, e.g., Panama Canal Treaties: Hearings Before the Senate Comm. on Foreign*

out passing judgment on the constitutionality of congressional attempts to advance the message of Congress itself by funding the speech of particular groups, it is clear that Congress cannot write favored organizations a blank check payable on the First Amendment.

IV. The Constitutional Remedy

Section 501(c)'s disparate treatment of lobbying by particular tax-exempt groups leads to an unconstitutional violation of equal protection principles. The final question before us is the appropriate relief. The most obvious remedy—striking down the Section 501(c)(3) lobbying limitation that now governs Taxation—poses the most obvious problems. The legislative history of that limitation clearly shows a congressional determination that the public interest requires regulating the amount of tax-deductible dollars flowing to Section 501(c)(3) organizations that may be used for lobbying purposes. Extending the lobbying treatment now given to veterans' organizations to all Section 501(c)(3) groups might open a Pandora's Box of woes and abuse. The government notes, for example, that during the 1980 fiscal year, there were 319,842 organizations listed as exempt under Sec-

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Relations, 95th Cong., 1st Sess. 566 (1977) (statement of Robert Charles Smith, National Commander, American Legion); *id.* at 578 (statement of Frank D. Ruggiero, National Commander, Amvets); *id.* at 582 (statement of Maj. Gen. J. Milnor Roberts, U.S. Army Reserve, executive director, Reserve Officers Ass'n.); *id.* at 595 (statement of Col. Phelps Jones, USA-Ret., director national security and foreign affairs, VFW); *Proposed Panama Canal Treaties, Hearings Before the House Comm. on International Relations*, 95th Cong., 1st & 2d Sess. 155 (1977-1978) (statement of Dr. John Wasylik, National Commander in Chief, VFW); *id.* at 163 (statement of William J. Rogers, immediate past national commander, American Legion); *id.* at 171 (statement of Frank D. Ruggiero, National Commander, Amvets); *id.* at 175 (statement of Dr. Robert P. Foster, chairman national foreign relations commission, American Legion); *id.* at 177 (statement of Col. Phelps Jones, director national security and foreign affairs, VFW).

tion 501(c)(3), but only 22,247 veterans' groups.[50] In 1978, contributions, grants, and gifts to Section 501(c)(3) organizations aggregated more than $21.9 billion, nearly 1500 times the $16.7 million given to veterans' organizations.[51] If we permitted Section 501(c)(3) groups to lobby as freely as veterans' organizations, there would be a clear risk of abuse by private interests and an increase in the amount of "selfish" contributions "made to advance the personal interests of the giver of the money." 78 CONG. REC. 5861 (Senator Reed). Even when they attempt to remedy constitutional violations, courts must resist ordering relief that clearly exceeds the legitimate expectations of Congress.[52]

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[50] IRS Supp. Brief at 40 (citing IRS Exempt Organizations Master File, 1980 IRS ANN. REP. 76). The government cautions that this does not represent a true universe of Section 501(c)(3) organizations, however, because certain organizations such as churches need not apply for recognition unless they desire a ruling, and because the ruling letter covers not only the applying organization but all of its subordinate units.

[51] *Id.* (based on 90 percent of all information returns filed by such organizations for the 1978 taxable year).

[52] Taxation also implies the existence of a considerably narrower remedy. It claims that the most repugnant feature of the current lobbying limitation in Section 501(c)(3) is that organizations that engage in "substantial lobbying" lose their right to receive *any* tax-deductible contributions and not just those contributions used specifically for lobbying. In his concurring opinion in *Cammarano v. United States*, for example, Justice Douglas suggested that the statute in question would have been found invalid had it denied *all* deductions to an organization that spent money to promote or oppose an initiative, rather than simply denying deductions of the money spent in that effort. 358 U.S. at 515. Taxation therefore suggests that an analogous remedy in this case would be to deny tax-deductibility only in an amount proportionate to the amount of lobbying in which a Section 501(c)(3) organization engaged. *Cf. Harris v. McRae*, 448 U.S. 297, 317 n.19 (1980), which held that a "broad disqualification from receipt of public benefits" may be unconstitutional even when a more limited exclusion is permissible. In that case, the Court held that although Congress might decline to subsidize certain

A second remedy is also possible in this case. As the Supreme Court has recognized, in certain situations benefits may be taken away from a preferred group in order to cure unconstitutionally unequal treatment, even if that group is not before the court. *See, e.g., Welsh v. United States*, 398 U.S. 333, 361-65 (1970) (Harlan, J., concurring in result); *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 543 (1942). "The right invoked is that to equal treatment; and such treatment will be attained if either their competitors' taxes are increased or their own reduced." *Iowa-Des Moines National Bank v. Bennett*, 284 U.S. 239, 247 (1931). *Cf. Kirk v. Commissioner*, 425 F.2d 492, 495 (D.C. Cir.), *cert. denied*, 400 U.S. 853 (1970) (refusing to reach constitutionality of

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medically necessary abortions, a "substantial constitutional question would arise if Congress had attempted to withhold all Medicaid benefits from an otherwise eligible candidate simply because that candidate had exercised her constitutionally protected freedom to terminate her pregnancy by abortion." *Id.* Taxation argues that precisely the same disproportionate penalty is imposed by Section 501(c)(3) when an organization exercises First Amendment rights fully, and urges that the Constitution requires at the very least that its contributors' deductions be limited only to the extent of the amounts actually spent on lobbying by a Section 501(c)(3) organization.

Taxation's argument is not without merit but we decline to grant the alternative remedy for the same reason discussed above. Each of the several hundred thousand Section 501(c)(3) organizations now monitored by the IRS may have hundreds of thousands of separate contributors. For each organization, the IRS would have to ascertain the proportion of lobbying activities to other expenses of the organization, and then trace that percentage through to the individual contributions in order to limit the amount of their deductibility to the same proportion. In a less complex world, this logical scheme might be appropriate, although it would not cure the equal protection violation found here. But this remedy could easily overload and destroy any IRS capacity for monitoring these organizations and become an administrative nightmare subject to widespread disregard or abuse. Although mandating such a remedy is within the authority of Congress, this court should not impose a massive new work-load on the IRS that leads to so partial a cure of the discrimination shown here.

income exclusion for ministers because even if the statute violated the Establishment Clause, "it would not affect the tax liability in this case. Rather ministers of the gospel would then no longer be entitled to the benefits of the exclusion."). Although a number of cases involving equal protection challenges to underinclusive federal benefit statutes suggest that "extension, rather than nullification, is the proper course," *Califano v. Westcott*, 443 U.S. 76, 89 (1979), "[i]n choosing between these alternatives, a court should attempt to accommodate as fully as possible the policies and judgments expressed in the statutory scheme as a whole." *Id.* at 94 (Powell, J., dissenting). It seems evident that the legislative judgments expressed in Section 501(c) will be less disturbed by striking down the preferential treatment now accorded the lobbying of veterans' organizations than by extending that treatment to Section 501(c)(3) organizations. The legislative history, suggesting that the current treatment of veterans may have been inadvertent but demonstrating a clear congressional concern to prevent abuse of charitable lobbying by private interests, fully confirms this view.

This remedy appears the most logical and most in accordance with the judgments expressed by Congress. But the veterans' organizations that would be directly affected by nullification of preferential treatment in Section 501(c) have not heretofore been parties to this litigation. Courts must always be cautious when dealing with the interests of those who have not had an opportunity to present their own arguments and defenses, partly because judicial legitimacy stems in large measure from hearing the views of all those who are directly involved. *See* Fiss, *The Supreme Court, 1978 Term—Foreword: The Forms of Justice*, 93 HARV. L. REV. 1, 44-46 (1979). It is less significant, though still noteworthy, that Taxation also opposes this solution to the unconstitu-

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tionality of Section 501(c).[53] We therefore decline to adopt this remedy at this time.

Accordingly, this case is remanded to the district court with the instruction that it cure the constitutionally invalid operation of Section 501(c) after inviting veterans' organizations to participate in framing the relief. In the interim, of course, the IRS may seek other remedies. It may decide that additional regulations governing lobbying by veterans' organizations—and mose diligent enforcement of the lobbying regulations that already govern those organizations—are in fact in accordance with the congressional purpose behind Section 501(c).[54] The IRS and veterans' groups might also seek from Congress a clearer determination of the purposes, if any, that Congress had in mind when it enacted legislation giving preferential tax treatment to lobbying by veterans, or passage of more narrow legislation that could show that veterans' groups actually speak for Congress in advocating specific kinds of veterans' programs and benefits. On the record before us, however, it is not even clear that Section 501(c)'s unequal application reflects any congressional intent whatsoever. The broad tax support provided to veterans' organizations for lobbying on any side of any issue they choose, and the companion restriction on lobbying by charitable groups and other Section 501(c)(3) organizations, creates an unconstitutional disparity. Exactly how this problem should be cured is not

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[53] Taxation Supp. Brief at 20 n.4. In *Iowa-Des Moines Bank v. Bennett*, 284 U.S. at 247, the Court ordered a refund of "the excess of taxes exacted" from appellants because "it is well settled that a taxpayer who has been subjected to discriminatory taxation through the favoring of others in violation of federal law, cannot be required himself to assume the burden of seeking an increase of the taxes which the others should have paid."

[54] The IRS presumably came to analogous conclusions concerning the treatment of lobbying by fraternal beneficiary societies, despite the apparent silence of the Code on that question. *See* pp. 10-11 *supra*.

a matter that should be decided initially by this appellate court, especially when all directly affected parties are not before us.

CONCLUSION

The First Amendment occupies a preferred place in out scheme of government. *Thomas v. Collins*, 323 U.S. 516, 530 (1945). This does not mean, however, that its application in a legal dispute is always simple. The lines will seem clearer when Congress directly prohibits a particular group from speaking in a particular place, and more confused when Congress subsidizes First Amendment expression unevenly through the intricacies of the Internal Revenue Code. Nevertheless, the principle remains the same. Bcause the Code differentiates in its treatment of protected First Amendment activity by various tax-exempt organizations, the constitutionality of its classifications must be judged by a heightened level of scrutiny.

When viewed in that light, there can be no question that the suggested distinctions between Taxation and preferred tax-exempt organizations are constitutionally meaningless. Discrimination in government subsidization of First Amendment rights must be narrowly tailored to meet a substantial state purpose, and the proffered distinctions between the favored groups and Section 501(c)(3) organizations are either unrelated to any governmental interest whatsoever or are illegitimate bases for governmental classification. Indeed, although it has not been necessary to reach the question, it is possible that these discriminations could not even be upheld under a test asking whether they were "rationally related to a legitimate governmental purpose," for the discrimination may have been nothing more than an accidental or inadvertent result of legislative drafting.

Tax discrimination against the lobbying of Taxation and similar tax-exempt organizations therefore fails to meet the constitutional standard appropriate here. We

reverse and remand this case with instructions that the unequal treatment be cured, either by restricting the tax benefits accorded veterans' organizations or by extending those benefits to Section 501(c)(3) organizations. Even in the arcane intricacies of the tax code, the government cannot give special voice nor lend special ear to any person or group no matter how worthy their ideas or their credentials. The exacting standards of the First Amendment do not allow the government to provide a preferred place for certain parties—at least not without a more substantial state purpose than has been shown here.

Reversed and remanded

MACKINNON, *Circuit Judge* (dissenting). Appellant Taxation with Representation of Washington (Taxation) is incorporated as a nonprofit charitable and educational organization whose purpose is to represent the general public on tax issues before Congress, the courts, and the executive branch. After its incorporation in June 1977, Taxation applied to the Internal Revenue Service (IRS) for a declaration that it was an organization described in § 501(c)(3) of the Internal Revenue Code (Code), 26 U.S.C. § 501(c)(3). Although Taxation may otherwise have qualified for section 501(c)(3) status,[1] the IRS determined that Taxation intended to devote a substantial part of its activities to "attempt[s] to influence legislation" by lobbying Congress on matters involving the federal tax system. The effect of that determination, the correctness of which Taxation does not contest, was to deprive it of several tax advantages, including exemp-

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[1] Section 501(c)(3) applies to:

> Corporations, and any community chest, fund, or foundation, organized and operated exclusively for religious, *charitable*, scientific, testing for public safety, literary, or *educational* purposes . . . no part of the net earnings of which inures to the benefit of any private shareholder or individual, *no substantial part of the activities of which is carrying on propaganda, or otherwise attempting, to influence legislation* (except as otherwise provided in subsection (h)), and which does not participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of any candidate for public office.

(emphasis added). Such organizations are exempt from taxation under the income tax subtitle unless such exemption is denied under I.R.C. §§ 502, 503, or 504, sections with which we are not concerned in this appeal. Wholly apart from the issues raised by the lobbying restriction, it could be seriously questioned how an organization the avowed purpose of which is the lobbying of Congress has a 'religious, charitable, scientific, testing for public safety, literary or educational purpose' that brings it within § 501(c)(3) in the first instance.

tion from certain taxes on its own activities[2] and the eligibility to receive tax deductible contributions.[3] (These

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[2] Tax benefits accruing to a § 501(c)(3) organization include: exemption from income tax by virtue of § 501(a); exemption from § 3111(a)'s federal social security (FICA) taxes by virtue of § 3121(a), (b)(8)(B); and exemption from § 3301's federal unemployment (FUTA) taxes by virtue of § 3306(b), (c)(8).

[3] I.R.C. § 170 provides for the deduction of contributions from income tax:

> (a) *Allowance of deduction.*—
>
> (1) General rule.—There shall be allowed as a deduction any charitable contribution (as defined in subsection (c)) payment of which is made within the taxable year. . . .
>
> (c) *Charitable contribution defined.*—For purposes of this section, the term "charitable contribution" means a contribution or gift to or for the use of—
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> . . . .
>
> (2) A corporation, trust, or community chest, fund, or foundation—
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> (A) created or organized in the United States or any possession thereof, or under the law of the United States, any State, the District of Columbia, or any possession of the United States;
>
> (B) organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes, or to foster national or international amateur sports competition (but only if no part of its activities involve the provision of athletic facilities or equipment), or for the prevention of cruelty to children or animals;
>
> (C) no part of the net earnings of which inures to the benefit of any private shareholder or individual; and
>
> (D) *Which is not disqualified for tax exemption under section 501(c)(3) by reason of attempting to influence legislation,* and which does not participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of any candidate for public office. [Emphasis added.]

Similar language permits donors to make analogous deductions with respect to the gift tax, I.R.C. § 2522(a)(2) (citizens or resi-

advantages are referred to collectively herein as the "tax benefits" accruing to organizations qualifying under section 501(c)(3).) Taxation may still qualify for tax exemption on its own income as a social welfare organization under I.R.C. section 501(c)(4).[4] That subsection, however, while placing no restrictions on an organization's lobbying activities, does not result in donors being permitted to *deduct contributions* from their own income, gift and estate taxes.[5]

After exhausting its administrative remedies, Taxation brought a declaratory judgment action against the Com-

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dents) & (b)(2) (nonresident aliens), and the estate tax, I.R.C. §§ 2055(a)(3) (citizens or residents) & 2106(a)(A)(ii) (nonresident aliens).

In addition, foundations may be deterred from contributing to an organization that fails the lobbying test for section 501(c)(3) status because otherwise untaxed foundations and their managers are subject to tax if the foundation pays any amount "to carry on propaganda, or otherwise to attempt, to influence legislation." I.R.C. § 4945(a), (d)(1).

[4] Section 501(c) applies to:

> Civic leagues or organizations not organized for profit but operated exclusively for the promotion of social welfare, or local associations of employees, the membership of which is limited to the employees of a designated person or persons in a particular municipality, and the net earnings of which are devoted exclusively to charitable, educational, or recreational purposes.

Taxation is the product of a merger between two organizations, one (Taxation with Representation Fund) a § 501(c)(3) group devoted to courtroom advocacy, and the other (Taxation with Representation) at § 501(c)(4) group devoted to legislative advocacy. *See* J.A. at 16.

[5] Taxation could also seek to qualify under I.R.C. § 501(h), which permits some § 501(c)(3) organizations to devote specified quantities of their exempt purpose expenditures to lobbying, rather than adhere to the less certain "substantiality" test of § 501(c)(3). In the district court, however, Taxation expressly disavowed any intention to make an election under § 501(h). J.A. at 15-16. *See* discussion at 22-24 *infra*.

missioner of Internal Revenue under 26 U.S.C. § 7428 (1976),[6] seeking a declaration that section 501(c)(3)'s restriction of substantial attempts to influence legislation is unconstitutional. The district court granted the Commissioners' motion for summary judgment, *Taxation with Representation of Washington v. Blumenthal*, 43 A.F.T.R. 2d (P-H) ¶ 79-419 (1979), and on appeal, a divided panel of this court affirmed. *Taxation with Representation v. Blumenthal*, No. 79-1464 (D.C. Cir. April 14, 1981). On June 11, 1981, this court voted to hear the case *en banc*, which under our rules vacates the panel opinions. The court's order stated that the hearing *en banc* would focus upon two issues: (1) the standard of review applicable to the challenged statutory scheme, and (2) the ultimate constitutionality of the Code's distinction between fraternal and veterans' organizations on the one hand and section 501(c)(3) exempt organizations on the other.[7]

I.

A case raising the same issue presented here was decided against one of Taxation's predecessor organizations[8] by the Fourth Circuit in *Taxation with Representation v. United States*, 585 F.2d 1219 (4th Cir. 1978), *cert. denied*, 441 U.S. 905 (1979). The district court in this case followed that decision in disposing of Taxation's contentions. 43 A.F.T.R.2d (P-H) ¶ 79-419 at 79-681. For the reasons set forth in the margin, I

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[6] Section 7428 authorizes certain courts to issue declaratory judgments in certain cases relating to the status and classification of organizations under 26 U.S.C. § 501(c)(3).

[7] Taxation also originally challenged the validity of permitting businesses to deduct their lobbying expenses as "ordinary & necessary" business expenses. *See* I.R.C. § 162(e). That contention was not pursued before the court *en banc*, and we do not reach its merits here.

[8] *See* not 4 *supra*.

find the present suit not barred by the doctrine of res judicata, and therefore address the merits.[9]

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[9] Taxation's papers in the district court made clear that it absorbed the functions of the taxpayer organization that lost in *Taxation with Representation*. *See* J.A. at 16-18. The record before the district court also establishes that Taxation has the same chief executive as had Taxation with Representation, the appellant in the Fourth Circuit case, *compare id.* at 14 *with id.* at 16, and employs the same attorney, *compare id.* at 6 *with* 585 F.2d at 1220. Despite this close relationship between issues and parties, the Government has not pleaded or argued that Taxation should be precluded, as a matter of res judicata or collateral estoppel, from litigating the issues the Fourth Circuit decided against Taxation with Representation.

Although collateral estoppel and res judicata are waivable affirmative defenses under Fed. R. Civ. P. 8(c), some courts have addressed the preclusion issue *sua sponte* where information within their notice has effectively relieved the defendant of his usual burden of proof on the issue. *E.g.*, Boone v. Kurtz, 617 F.2d 435, 436 (5th Cir. 1980) ("[E]ven though Fed. R. Civ. P. 8(c) denominates res judicata as an affirmative defense[,] [d]ismissal by the court *sua sponte* on *res judicata* grounds . . . is permissible in the interest of judicial economy where both actions were brought before the same court"); Gullo v. Veterans Coop. Housing Ass'n, 269 F.2d 517, 517 (D.C. Cir. 1959) (trial court may apply res judicata upon taking notice of parties' previous case); Wilson v. United States, 166 F.2d 527, 528-29 (8th Cir. 1948) (appellate court on own motion may determine action is barred by res judicata); Holmes v. United States, 231 F. Supp. 971, 972-73 (N.D. Ga. 1964), *aff'd*, 353 F.2d 785 (5th Cir. 1965) (court, apparently on own motion, took judicial notice of prior proceedings and applies res judicata on defendants' motion for summary judgment). *Accord, cases cited in* United States v. Sioux Nation, 448 U.S. 371, 432 (1980) (Rehnquist, J., dissenting). *See also* Southern P. R.R. v. United States, 168 U.S. 1, 55-61 (former judgment held conclusive even though estoppel not specially pleaded).

The rationale for *sua sponte* action on questions of preclusion is that relitigation should be precluded not simply to serve defendant's interest in avoiding litigation, but also to avoid judicial waste and to foster reliance on judicial decisions. Wilson v. United States, *supra*, 166 F.2d at 528-29; *see generally* Montana v. United States, 440 U.S. 147, 153-54 (1979) *and authorities cited*. The defendant's consent to relitigation cannot always be decisive, for there is an

Taxation challenges the Tax Code's denial of tax benefits to otherwise qualified organizations which engage in substantial lobbying on what it views as two independent grounds. First, it asserts that section 501(c)(3), by conditioning tax benefits on the non-exercise of an organization's rights of speech, press, and petition, violates the first amendment. This attack does not rely on any distinctions drawn by the Code among organizations, but rather proceeds from the premise that the lobbying restriction is invalid, regardless of the uniformity of its application, as a burden on protected speech. *See* Taxation Br. at 15. Second, Taxation argues that the Code, by placing restrictions on the lobbying activities of section 501(c)(3) organizations while placing no similar restrictions of those of veterans' organizations defined in section 501(c)(19) or fraternal orders defined in sections 501(c)(8) and (10), denies it the equal protection of the laws guaranteed by the fifth amendment's due process clause.[10]

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independent public interest "in preventing the misallocation of judicial resources and second guessing prior panels of Art. III judges when the issue has been fully and fairly litigated in a prior proceeding." United States v. Sioux Nation, *supra*, 448 U.S. at 433 (Rehnquist, J., dissenting).

We are thus tempted to determine whether Taxation should be estopped to litigate the same issues on which Taxation with Representation lost in the 4th Circuit. However, the Government's failure to plead preclusion at any stage of this litigation deprived Taxation of an opportunity to argue that such defense should not apply, and it is not clear that Taxation has no arguable objection to such application. We thus have a choice of remanding for a hearing on that issue, *see, e.g.*, Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation, 402 U.S. 313 (1971) (remanding to permit defendant to plead collateral estoppel and plaintiff to challenge the plea), or of disposing of Taxation's case on the merits. The original panel determined that judicial economy would be best served by taking the latter course, and so proceeded to the substantive issues, as we have determined to do here.

[10] "[I]f a classification would be invalid under the Equal Protection Clause of the Fourteenth Amendment, it is also inconsistent

II.

Taxation's first claim is based on the contention that the statutory denial of tax benefits to organizations that engage in subsantial lobbying places an "unconstitutional condition" upon the enjoyment of those benefits.[11] The cornerstone of this argument is *Speiser v. Randall*, 357 U.S. 513 (1958), in which the opinion of Justice Harlan for the Court established the proposition that the enjoyment of a government-conferred benefit cannot be made contingent upon compliance with a condition that violates the first amendment rights of one who would otherwise qualify for the benefit.[12] Taxation urges that the lobbying restriction in section 501(c)(3) imposes precisely such a condition. This contention, as the majority recognizes, is without merit.

Taxation does not claim that the challenged provisions "chill" its speech by imposing a *direct* restriction or penalty upon its lobbying activities. Nor, moreover, does it claim that the effectiveness of its presumed "charitable

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with the due process requirement of the Fifth Amendment." Johnson v. Robison, 415 U.S. 361, 364 n.4 (1974). *See* Buckley v. Valeo, 424 U.S. 1, 93 (1976).

[11] We consider primarily the denial of tax exemption for Taxation's own income, but note that there is no serious question as to Taxation's standing to challenge conditions upon the deductibility of donors' contributions to it. It is our understanding that in doing so, Taxation is asserting its *own* rights, and not the rights of third party potential donors not before the court.

[12] *Speiser* invalidated a requirement that persons seeking to qualify for a state constitutional property tax exemption for veterans sign a loyalty oath. The Court held that the requirement improperly created a presumption of disloyalty on the part of applicants the burden of overcoming which impermissibly chilled the applicants' exercise of their speech rights. "The man who knows that he must bring forth proof and persuade another of the lawfulness of his conduct necessarily must steer far wider of the unlawful zone than if the state must bear these burdens." 357 U.S. at 526.

and educational" activities—in fact, lobbying of Congress —is diminished by the bare fact, without more, of its non-exempt status. Taxation's claim is confined to the assertion that because it does not qualify as an exempt organization under section 501(c)(3), it is rendered significantly less able to raise funds in support of its activity.[13] Even if government has no obligation to support its activities either directly or through the tax structure, Taxation argues, the decision to provide or withhold such support cannot permissibly turn upon whether or not it exercises its first amendment right to lobby.

The condition placed upon Taxation plainly has its *direct* effect not upon speech, but upon fundraising. This fact does not, however, render the protections of the first amendment inapplicable, for it is well established that "the Constitution's protection is not limited to direct interference with fundamental righs." *Healy v. James*, 408 U.S. 169, 183 (1972). "Even where a challenged regulation restricts freedom of expression only incidentally," the first amendment demands heightened judicial sensitivity. *Schad v. Borough of Mount Ephraim*, 101 S. Ct. 2176, 2183 n.7 (1981). *See also Buckley v. Valeo*, 424 U.S. 1, 21 (1976); *Bates v. City of Little Rock*, 361 U.S. 516, 423 (1960). The question whether the condition placed upon exempt status by section 501 (c)(3) violates any right guaranteed Taxation by the first amendment therefore deserves thorough examination.

I agree that lobbying is an activity generally protected by the first amendment. I also agree for the purposes of this case that Taxation possesses in general the same rights of speech and petition guaranteed other persons. *See First National Bank v. Bellotti*, 435 U.S. 765 (1978). But in my view, under the specific circum-

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[13] As the Supreme Court has noted, many contributors "simply will not make donations to an organization that does not appear" on the Cumulative List of exempt organizations published by the IRS. Bob Jones University v. Simon, 416 U.S. 725, 729-30 (1974).

stances of this case, Congress could constitutionally condition the availability of tax benefits upon an agreement not to engage in substantial lobbying. In this instance, the reach of Taxation's right to lobby can be determined only in the context in which that right is asserted.[14] By holding itself out as a charitable or educational organization and laying claim to the tax benefits accorded such organizations, Taxation has assumed a status which Congress may constitutionally regard as incompatible to some extent with the carrying on of substantial political activities, and which may therefore be made subject to conditions upon its enjoyment that would otherwise be impermissible.

In first amendment cases, the threshold question of the level of scrutiny applicable to the challenged provision turns upon whether the alleged restriction is one based upon the "content" of the communication sought to be protected. Where speech is restricted because of its content rather than because of its incidental effects on governmental interests the Constitution demands strict judicial scrutiny. Satisfaction of that standard requires the government to demonstrate "that its regulation is necessary to serve a compelling interest and that it is narrowly drawn to achieve that end." *Widmar v. Vincent*, 102 S. Ct. 269, 274 (1981). In contrast, where a restriction, though trenching on speech, is directed not at the content of the speech, but at the "nonspeech" elements of the restricted activity, government bears the considerably lighter burden of showing that the restriction furthers an "important or substantial governmental interest" and is "no greater than is essential to the furtherance of

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[14] As Taxation conceded in its brief before the original panel in this case, "in establishing a benefit program, the Government may include requirements that are necessary to assure that the objects of the program are attained." Taxation Br. filed 8/1/79 at 14 n.5. *See* Buckley v. Valeo, 424 U.S. 1, 57 n.65 (1976); Community-Service Broadcasting of Mid-America, Inc. v. FCC, 593 F.2d 1102, 1129 (D.C. Cir. 1978) (en banc); Note, *Unconstitutional Conditions*, 73 HARV. L. REV. 1595, 1600 (1960).

that interest." *United States v. O'Brien*, 391 U.S. 367, 377 (1968). *See Consolidated Edison Co. v. Public Service Commission*, 447 U.S. 530, 540 n.9 (1980).

For the reasons set forth below, I view the lobbying restriction in section 501(c)(3) as one unrelated to the content of protected speech. I have no difficulty in finding that the governmental interest expressed by the restriction is a substantial one, and that the means Congress has chosen to protect that interest are sufficiently narrow to satisfy the Constitution. Consequently, in my opinion Taxation's argument that the lobbying restriction in section 501(c)(3) is an "unconstitutional condition" upon the enjoyment of the tax benefits Taxation seeks to finance its substantial lobbying should be rejected.

A.

Taxation argues that the lobbying restriction is one "based on the type of speech or the subject matter" of protected expression, and therefore merits strict scrutiny. Taxation Br. at 15. However, the argument plainly fails when one compares section 501(c)(3) with the types of statutes invalidated by the Supreme Court as "content-based" restrictions on speech. Section 501(c)(3) is not a restriction based on content. It is not aimed at the "message" or "communicative impact" of Taxation's activities, but rather at confining tax-supported organizations to those activities Congress deems worthy of encouraging by public support through the tax system. The restriction is directed neither toward controlling what Taxation's audience may hear, nor toward controlling Taxation's message because of its viewpoint or subject matter. It simply regulates the activities of an entity which happens to be, *inter alia*, a speaker, and is imposed for reasons wholly unrelated to the message Taxation seeks to convey.[15] The fact that the statute

[15] *See generally* Redish, *The Content Distinction in First Amendment Analysis*, 34 STAN. L. REV. 113, 114-118 (1981).

in terms specifically restricts activities a "substantial part" of which is "carrying on propaganda, or otherwise attempting to influence legislation" cannot support the inference that the provision is one aimed at any particular subjects or viewpoints.

The Supreme Court's decisions invalidating content-based restrictions on speech demonstrate that strict first amendment scrutiny is reserved for those instances in which the government has sought specifically to "dictat[e] the subjects about which persons may speak and the speakers who may address a public issue." *First National Bank v. Bellotti*, 435 U.S. 765, 785 (1978). The application of this high standard is appropriate "[e]specially where . . . the legislature's suppression of free speech suggests an attempt to give one side of a debatable public question an advantage in expressing its views . . . ." *Id.* Even where the motive of Congress in enacting a restriction bearing on speech has been claimed to be non-neutral with respect to content, *see United States v. O'Brien*, *supra*, the Court has refused to apply strict scrutiny. It has confined application of that test to cases in which the government's asserted interest is *directly related* to the *content* of the restricted communication. *See, e.g.*, *Widmar v. Vincent*, *supra*, 102 S. Ct. 269 (1981) (invalidating, on free speech grounds, state university rules that generally permitted use of campus facilities but denied use for religious purposes); *Metromedia, Inc. v. San Diego*, 101 S. Ct. 2882 (1981) (invalidating ordinance that permitted commercial expression while prohibiting noncommercial expression in identical circumstances); *Central Hudson Gas & Electric Co. v. Public Service Commission*, 447 U.S. 557 (1980) (invalidating regulation that prohibited utility from promoting use of electricity); *Consolidated Edison Corporation v. Public Service Commission*, 447 U.S. 530 (1980) (invalidating regulation that prohibited utility from expressing views on "controversial issues of public policy"); *Carey v. Brown*, 447 U.S. 455 (1980) (invalidating ordinance that per-

mitted labor picketing while prohibiting other picketing); *Police Department v. Mosley*, 408 U.S. 92 (1972) (same).[16]

Where neither discrimination among viewpoints nor among subjects of discussion is involved, the concerns prompting strict scrutiny are absent. The lobbying restriction imposed in section 501(c)(3) does not "dictat[e] the *subjects* about which persons may speak and who may address *a* [*given*] *public issue*," and certainly does not "suggest an attempt[] to give *one side* of a debatable public question an advantage in expressing its views . . ." *First National Bank v. Bellotti, supra*, 435 U.S. at 785 (emphasis added). The statute merely reflects Congress' determination that groups claiming exemption from the normal obligations imposed by the tax laws must devote the resources thereby gained to the purposes for which Congress granted the exemption in the first place.[17]

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[16] We focus on cases relating to content restrictions based upon *subject matter* because they involve the Court's broadest reading of the term "content." In cases involving the invalidation of restrictions based on the *particular viewpoint* of a speaker on a given subject, the distinction between such restrictions and § 501(c)(3) is even plainer. *See, e.g.*, First Nat'l Bank v. Bellotti, 435 U.S. 765 (1978) (invalidating statute which limited corporate speech to protection of corporations' business interests).

[17] This is not the type of legislative directive to "stick to business" invalidated in *First National Bank v. Bellotti, supra*, 435 U.S. at 785 ("If a legislature may direct business corporations to 'stick to business,' it may also limit other corporations—religious, charitable or civic—to their respective 'business' when addressing the public."). The statute struck down in that case limited corporate speech on referendum issues to instances in which the corporation's interests were presumed (by the statute itself) to be affected. Section 501(c)(3) does not operate in any way to restrict the subjects upon which Taxation may lawfully speak, nor does it condition Taxation's receipt of tax benefits upon the subjects it addresses. *The lobbying restriction is entirely neutral with respect to the subject matter of the legislation sought to be influenced.* Section 501(c)(3) merely requires charitable and educational or-

The restriction imposed by § 501(c)(3) is not rendered invalid merely because it requires organizations enjoying exempt status to confine themselves to largely non-political activities. The ordinance invalidated in *Village of Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620 (1980), somewhat similarly restricted the activities of charitable groups by requiring that they spend at least 75 percent of their receipts directly for "charitable purposes." A principal difference between that restriction and the one involved here is that the Schaumburg ordinance burdened an activity (solicitation of funds door-to-door) "characteristically intertwined" with speech. A second significant difference, however, is that the restriction in *Schaumburg* was defended primarily as one that sought to prevent fraud upon donors.[18] Section 501(c)(3) has an entirely different purpose. Here, the government has conferred tax benefits on the organization seeking taxpayer support in order to encourage particular kinds of activity in the public interest, and has imposed the lobbying restriction as a means to insure that that benefit is issued *directly* to further the purposes Congress sought to encourage in granting the benefit.[19]

B.

The foregoing establishes that this case does not concern a *content*-based restriction on speech. It remains to decide whether the lobbying restriction satisfies the lower

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ganizations to spend the fruits of their special tax status in ways that Congress finds to be consistent with the purposes for which that status was created, *i.e.*, to further charitable and educational purposes. *See* discussion at 15-17 *infra*.

[18] The other asserted governmental interest was protection of residents' privacy from the intrusions of door-to-door solicitors. 444 U.S. at 638-39.

[19] The nature of the governmental interest expressed by the lobbying restriction is more fully discussed at 15-17.

standard of first amendment review imposed by *United States v. O'Brien, supra*, 391 U.S. 367 (1968).[20] That standard is, as stated above, whether the law in question serves an "important or substantial governmental interest" whose "incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest." *Id.* at 377. It is my conclusion that section 501(c)(3) satisfies both concerns.

1. *Governmental Interest*

Taxation argues that there is no clear statement in the legislative history of section 501(c)(3) of the purpose Congress sought to achieve in imposing the lobbying restriction as a condition on the enjoyment of tax benefits, and claims that the statute is therefore supported only by "*post hoc* and speculative arguments of Government counsel, which are constitutionally insufficient." Taxation Br. at 16. I disagree. The interests Congress sought to further are clear, and clearly suffice to justify the statute.

Where legislative intent is manifest in the words or obvious effect of a statute itself, the absence of comment thereon in the hearings, reports, or floor debates of Congress is not to be taken as evidence that the statute is devoid of rational purpose. *See Boys Markets, Inc. v. Retail Clerks Union, Local 770*, 398 U.S. 235, 241 (1970). So-called "*post-hoc*" arguments are permissible to interpret and support congressional enactments. Congress is not an administrative agency that is required to state the grounds upon which it acts, and courts do not interfere with the powers of Congress when exercising their judicial power to interpret federal statutes. *Cf. Securities and Exchange Commission v. Chenery Corporation*, 332

[20] The Supreme Court recently reaffirmed the appropriateness of the *O'Brien* standard in cases not involving content-based restrictions. Consolidated Edison Co. v. Public Svc. Comm'n, 447 U.S. 530, 540 n.9 (1980).

U.S. 194, 196 (1947); *id.*, 318 U.S. 80, 95 (1943). It is not necessary in its legislative record for Congress to explain every provision of every statute and foresee every argument that may be asserted in support of or against its enactments. This is as true in the first amendment context as it is elsewhere. *See, e.g., Buckley v. Valeo*, 424 U.S. 1, 106 (1976). Although the fact is often forgotten, statutes can often be interpreted by reference to their plain terms without reference to extraneous sources. This is such a statute. Read in the context of the plain purpose of section 501—to benefit certain groups performing various services that Congress views as being in the public interest[21]—subsection (c)(3) clearly indicates a congressional intent to encourage certain activities viewed as charitable and educational.

The lobbying restriction, since it cannot successfully be attacked on the ground that it discriminates among organizations based upon the content of their speech, can only sensibly be read as an attempt to confine such groups to purposes that are directly charitable or philanthropic. As Judge Wilkey has stated, the lobbying restriction in section 501(c)(3) *"is aimed at assuring some purity in that purpose."*[22] Similarly, a committee report interpreting the provision shortly after its original enactment stated:

> The exemption . . . is based upon the theory that the Government is compensated for the loss of revenue by its relief from financial burden which would other-

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[21] A survey of the various exemptions stated in § 501(c) will reveal the general types of interests Congress sought to protect. *See* I.R.C. § 501(c)(1)-(22).

[22] "Americans United," Inc. v. Walters, 477 F.2d 1169, 1183 (D.C. Cir. 1973) (concurring opinion), *rev'd on jurisdictional grounds sub nom.* Alexander v. "Americans United" Inc., 416 U.S. 752 (1974) (emphasis in original). *See also* Bob Jones University v. Simon, 416 U.S. 725, 772 & n.8 (1974) (Blackmun, J., dissenting); Haswell v. United States, 500 F.2d 1133, 1150 (Ct. Cl. 1974).

> wise have to be met by appropriations from other public funds . . .

H.R. Rep. No. 1860, 75th Cong., 3d Sess. 19 (1938). Congress could reasonably conclude that limiting the lobbying activities of educational and charitable organizations was a proper means of ensuring that the benefits these organizations produce will be received by the intended beneficiaries.

Although it is unnecessary, in the absence of evidence indicating a contrary intention, to seek further justification in the legislative history for the lobbying restriction, it merits noting that contrary to Taxation's claims, there is a strong indication of Congress' intent in imposing that regulation. The floor debate on amendments to the Revenue Act of 1934, in which section 501(c)(3) (section 23(o) of the 1934 Act) has its origin, contains discussion the significance of which cannot be obscured by its brevity.

In a colloquy between Senator Reed of Pennsylvania and Senator Harrison, the concern was raised that the language restricting propaganda and attempts to influence legislation—the precise language found in the statute today—would have the effect of denying exempt status to organizations such as "the Society for the Prevention of Cruelty to Children, or the Society for the Prevention of Cruelty to Animals, or any of the worthy institutions that we do not in the slightest mean to effect." 78 Cong. Rec. 5861 (1934) (remark of Sen. Reed). Although he specifically noted and endorsed this desire on the part of Congress to protect the activities of such philanthropic groups, Senator Reed voiced the position of the Senate Finance Committee that "[t]here is no reason in the world why a contribution . . . should be deductible as if it were a charitable contribution *if it is a selfish one* made to advance the personal interests of the giver of the money. *That is what the committee was*

trying to reach . . ." *Id.* (emphasis added).[23] Despite the fact that Senator Reed personally favored a narrower restriction, Congress, having before it the above interpretation by a leading member of the committee charged with responsibility for tax matters, adopted the language presently found in section 501(c)(3). Even if the statutory language were thought to leave substantial doubt about the purpose sought to be achieved by the lobbying restriction, this revealing history resolves any question about the intent of Congress in adopting it.

Thus interpreted, it is beyond question that the lobbying restriction serves an "important and substantial' interest of the United States. The encouragement of charity, education, and similar objectives through the tax system, like that achieved by direct congressional appropriations for such purposes, is an interest whose legitimacy cannot seriously be doubted. The interests served by the activities of the organizations enumerated in section 501(c)(3) are well within both the power of Congress to serve the public interest and the traditional scope of the exercise of that power.

2. *The Scope of the Restriction*

Taxation's final argument against section 501(c)(3) is that, even conceding the government to have an important and substantial interest that is served by the restriction, the restriction is invalid because it is broader "than is essential to the furtherance of that interest." *United States v. O'Brien*, *supra*, 391 U.S. at 377. Even where a restriction on speech is not directed at content, the first amendment imposes the requirement that government adopt the means of achieving its purpose that is least restrictive of first amendment interests. *Village of Schaum-*

[23] The majority suggests that "it would be grossly simplistic" to attribute much significance to this exchange. Majority op. at 44. Since I take the view that this evidence only confirms the intent obvious from the face of the statute, extended discussion of the proper weight to be accorded it is unnecessary.

burg v. Citizens for a Better Environment, 444 U.S. 620, 636 (1980).

Taxation's argument is based upon the fact that *all* tax benefits emanating from section 501(c)(3) are denied to any organization a "substantial part of the activities of which" is lobbying. This, Taxation alleges, renders the restriction broader than necessary to achieve Congress' purpose, in that if Congress sought only to deny tax benefits to organizations engaged in "selfish" activity, and so to deny deductibility to their contributors, the achievement of that end requires only that *that portion* of contributions *actually used* for the prohibited "selfish" purposes be treated as nonexempt and non-deductible. The remainder of the funds, used for purposes not expressly forbidden, would continue to qualify for exemption and deductibility.

The accuracy with which government defines categories of citizens for the purposes of regulation is a matter of particular importance when first amendment interests are at stake. *Central Hudson Gas & Electric Corp. v. Public Service Commission*, 447 U.S. 557 (1980). Courts in such circumstances are not relieved, however, of their duty to respect the superior competence and concomitant authority of the legislature in devising means of regulation. As was held in *Buckley v. Valeo*, 424 U.S. 1, 30 (1976), "Congress' failure to engage in such fine tuning does not invalidate" legislation, even where the legislation in question burdens first amendment freedoms of speech and association. *See also, id.* at 83, 103.[24] It

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[24] Judges and commentators have frequently noted the dangers inherent in judicial attempts to refine regulatory schemes, even where undertaken in order to enforce compliance with the first amendment. *See, e.g.*, Central Hudson Gas & Electric Corp. v. Public Service Comm'n, *supra*, 447 U.S. at 599-606 (1980) (Rehnquist, J., dissenting); Cox, *The Supreme Court, 1970 Term—Foreword: Freedom of Expression in the Burger Court*, 94 HARV. L. REV. 1, 35 (1980) (questioning the "close judicial analysis of

has long been recognized that this deference to legislative competence is particularly appropriate where the regulation involved is a system of taxation. *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 41 (1973); *Madden v. Kentucky*, 309 U.S. 83, 88 (1940).

I reach the same conclusion as the majority and view the Code as a whole as a scheme of regulation that is sufficiently narrow to satisfy first amendment concerns. In my opinion, the recent enactment of section 501(h) of the Code provides an insight into Congress' choice of means in regulating charities that compels the conclution that section 501(c)(3) is valid.[25]

Before proceeding to a discussion of the terms of section 501(h) and their relationship to section 501(c)(3), it is important to note the significance of that relationship. Section 501(h) is the product of an extensive effort by Congress to establish precise limits on the political activity of charitable organizations.[26] In effect, *section 501*

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policy alternatives [in *Central Hudson*], with the burden put upon the state to foresee and negate all the alternatives that the Court can imagine . . .").

[25] The parties did not focus on the significance of § 501(h) in their arguments before this court. Taxation's ability and willingness to elect coverage under § 501(h), *see* discussion at 22-24 *infra*, need not be considered, however for we rely on that section not simply as affording Taxation of less restrictive alternative in fact, but also as a source of guidance in evaluating the existing scope of § 501(c)(3).

[26] At least as early as 1972, Congress held hearings on the problems posed by § 501(c)(3)'s lobbying restriction. *See* Legislative Activity by Certain Types of Exempt Organizations: Hearings Before the House Comm. on Ways and Means, 92d Cong., 2d Sess. (1972). Several bills were introduced in earlier sessions on the subject prior to the ultimate adoption of section 501(h) by the 94th Congress in Pub. L. No. 94-455, 90 Stat. 1520 (1976). *See* H.R. REP. No. 94-1345; 122 Cong. Rec. 16886 (June 8, 1976). According to Congressman Ullman, the sponsor of the bill that ultimately became § 501(h), "further decisions were made in committee markup sessions in 1974 . . . Throughout 1975, the

(h) constitutes the congressionally-engineered "less restrictive alternative" to the lobbying restriction in section 501(c)(3). Rarely are courts in our position presented with such a ready-made, legislatively-created solution to the sort of first amendment problem raised here. We should therefore recognize that this action by Congress is entitled the great weight.

In addition to this prudential aspect of the relationship between the two subsections, there is an important logical connection. On the one hand, if section 501(h) truly offers a less restrictive alternative than section 501(c)(3) to organizations like Taxation, Taxation's remedy is to proceed under subsection (h) rather than under (c)(3).[27] If, on the other hand, section 501(h) is an *equally* or *more* restrictive means of confining charities to their proper purposes, one should be extremely reluctant to hold that Congress can and must produce a still better resolution of the competing interest than it has in either 501(h) or 501(c)(3). Bearing in mind the effort Congress has made to resolve these interests precisely, and this court's limited authority to second-guess that determination, I proceed to an examination of the purpose and effect of section 501(h).

Section 501(h) was enacted as part of the Tax Reform Act of 1976, Pub. L. No. 94-455 § 1307, 90 Stat.

Treasury Department, many of the charitable organizations interested in these proposals, and representatives of major religious organizations all joined with staff members to reach agreements . . ." *Id.*

(Although section 501(h) and its related provisions were passed as part of the Tax Reform Act of 1976, Pub. L. No. 94-455, the tax writing committees of both houses originally considered the measure as a separate bill, H.R. 13500. *See* H.R. REP. No. 94-1210; S. REP. No. 94-938; S. REP. No. 94-1236 (conference report) (all 94th Cong., 2d Sess. (1976)).

[27] Taxation has declined to do so. We discuss the significance of this decision at 22-24, *infra*.

1720 (1976). It permits organizations described in section 501(c)(3) to opt out of regulation under the "substantial part" standard of (c)(3) and come under precise quantitative limitations on the amount they may spend on influencing legislators ("lobbying expenditures") and the public ("grass roots expenditures"). I.R.C. § 501(h)(2)(A), (C). Generally speaking, any section 501(c)(3) organization that is not a church may so elect. I.R.C. § 501(h)(5). By electing to be treated under section 501(h), an organization is permitted, subject to certain disclosure requirements, to expand on lobbying and "grass roots" political activity up to 25% of the amount it spends on exempt purposes specified in section 501(c)(3).[28] Expenditures in excess of this ceiling amount result in the imposition of a 25% tax on the excess. I.R.C. § 4911(a)(1).

The history of attempts to clarify and quantify the limits on the political activity of exempt organizations which culminated in the adoption of section 501(h) in 1976 is a fine example of congressional activity in response to first amendment concerns. The features of section 501(h) and its related provision, section 4911, combine to satisfy any valid objection that Taxation may have to the lobbying restriction. First, they represent a clear statement of Congress' understanding of the relationship between charitable purposes and political activity. Any ambiguity of purpose claimed to underlie the section 501(c)(3) lobbying restriction, *see* Taxation Br. at 16; majority op. at 45, is resolved by section 501(h)'s treatment of the subject.[29] Second, Taxation's objection

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[28] I.R.C. § 4911(c) sets forth the formulae for determining the maximum expenditures permitted.

[29] Congress in facing the question of legislative activity by exempt organizations could have chosen to repeal the lobbying restriction. This it declined to do, suggesting that doubts about the purpose of that section as adopted in 1934 are largely misconceived.

that section 501(c)(3) denies *all* tax benefits to an organization that does *some* (i.e., a more than an insubstantial amount of) lobbying, is addressed by section 4911's 25% tax on excess lobbying expenditures. I.R.C. § 4911(a). The loss of tax benefits is, under this system, directly proportional to the extent of the organization's lobbying activity, eliminating the alleged "massive overkill" effect of section 501(c)(3). *See* Taxation Br. at 17. Finally, the legislative history and structure of section 501(h) illustrates the weakness of the claim, *see* Taxation Br. at 15, that Congress is seeking to regulate speech because of its communicative impact.[30]

It remains to be considered whether the availability of the section 501(h) alternative is relevant here. I believe that it is, notwithstanding the fact that Taxation has elected not to come under that section's coverage.

As noted previously, the chief significance of section 501(h) for the purposes of this case lies in the fact that it represents a recent congressional enactment to meet the problems that Taxation now raises. The statute indicates (1) that Congress finds that legislative lobbying activity might be compatible with charitable purposes to a *limited* extent, and (2) that any charitable organization wishing to engage in legislative activity should, in the judgment of Congress, be subject to well-defined regulatory limits on their lobbying activities. Whether or not an organization

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[30] Particularly noteworthy is § 4911's "sliding scale" definition of the permitted level of political expenditures. This provision was included as an alternative to the § 501(c)(3) "substantial part" test, which created the possibility that two organizations of different size which spend the same dollar amount on lobbying would be treated differently because that amount bears a different relationship to the *total* expenditures of the organizations. *See* 122 Cong. Rec. S16884 (daily ed. June 8, 1976); *see also* "Americans United," Inc. v. Walters, 477 U.S. 1169, 1173 (D.C. Cir. 1973), *rev'd on jurisdictional grounds sub nom.* Alexander v. "Americans United" Inc., 416 U.S. 752 (1974).

chooses to elect coverage under section 501(h), these congressional determinations must be respected.

Although Taxation from all indications in the record would qualify for treatment under section 501(h), it testified before the District Court that it elected not to be so treated:

> [Taxation] has not made and does not plan to make, an election under section 501(h) and 4911 of the Code. Such an election might require us to accept restrictions which are not justified or authorized under the First Amendment of the Constitution, on our right to communicate with our contributors and members regarding matters of legislative interest. Section 501(h) and 4911 also fail to define with any narrow specificity such terms as "legislative activities" and "taxable expenditures". For this reason, an election under section 501(h) might require us to impose prior restraints on the publication of Articles in our weekly tax news-magazine, Tax Notes. An election under section 501(h) might also require us to accept limitations on our legislative activities which we believe are unconstitutional and which are not imposed on similarly situated tax exempt organizations, such as, for example, trade associations, fraternal societies, labor unions, veterans organizations, and in practice, churches. In addition, the income of an organization such as Taxation with Representation of Washington normally fluctuates widely from year to year. Therefore as a practical matter, a percentage test—such as that in section 501(h)—to determine the permissible level of spending on legislative activities is unworkable.

Field Aff. a 2-3 (J.A. at 15-16).

Except for the same complaints of discriminatory treatment that it raises in this case, Taxation's alleged reasons for choosing to remain under section 501(c)(3) amount to conclusory objections to (1) the specificity of statutory

terms in sections 501(h) and 4911, and (2) the "workability" of a quantitative expenditure limitation. These questions regarding section 501(h) are obviously not suited for resolution here.[31] However, we do not believe that this precludes us from recognizing the existence of the statute or the congressional determinations that it represents. Although Taxation cannot be compelled to elect coverage under section 501(h), this does not mean that its present case must be evaluated as if that statutory alternative did not exist.

From the foregoing, it is submitted that Congress has legitimately drawn a distinction between charitable organizations that engage in substantial lobbying and those that do not. The restrictions to which an organization is subject depend upon the extent of its exercise of the right to lobby, but in any event, those restrictions serve a clearly valid public interest and are drawn with sufficient precision to comport with the requirements of the first amendment.

III.

Next to be considered is Taxation's second claim that imposing the lobbying restriction on the activities of section 501(c)(3) organizations, while placing no similar restriction upon fraternal organizations exempted by section 501(c)(8) and (10) or veterans' groups exempted by section 501(c)(19), discriminates against Taxation in a constitutionally impermissible manner. This claim is similarly rejected.

Recent legislative attempts to deal with the complex relationship of money, politics, and constitutional guarantees

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[31] It is noted that Taxation, while advertising in its affidavit to the alleged vagueness of terms used in §§ 501(h) and 4911, raised no similar vagueness objections to § 501(c)(3). Considerable deference should also be paid to the specific quantitive standards set forth in the statute. *See* Buckley v. Valeo, 424 U.S. 1, 30, 83 (1976).

have provided the Supreme Court with several opportunities to set forth the standards applicable here. Those standards support the conclusion that Congress has acted consistently with the requirements of the first amendment.

In evaluating any claim of unlawful discrimination, whether under the constitutional strictures of the first, fifth and fourteenth amendments or under some other provision of law, it must be remembered that "[s]ometimes the grossest discrimination can lie in treating things that are different as though they were exactly alike . . ." *Buckley v. Valeo*, 424 U.S. 1, 97-98 (1976), *quoting Jenness v. Fortson*, 403 U.S. 431, 441-42 (1971). It cannot simply be presumed that two parties, one of who complains of treatment different from that received by the other, are situated so similarly that the difference rises to the level of "discrimination." Obviously, differential treatment of members of *different* classes of persons cannot be equated with differential treatment of persons identically situated. Constitutional scrutiny of an alleged "discrimination," in short, presupposes that the essential characteristics of the complaining party are in the main indistinguishable from the characteristics of those who are alleged to be treated more favorably. Equal protection does not require that "things which are different in fact . . . be treated in law as though they were the same." *Tigner v. Texas*, 310 U.S. 141, 147 (1940).

We take it as beyond dispute that were Congress to preserve the existing benefit provisions favoring veterans' organizations while *wholly eliminating* those afforded other charitable organizations, Taxation would be without a colorable claim of discrimination under the first or fifth amendments.[32] Generally speaking, Congress is free, subject to the minimal constraint of "rationality,"[33] to

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[32] *See*, maj. op. Part IIA.

[33] *See* New Orleans v. Dukes, 427 U.S. 297, 303 (1976) (per curiam).

determine that veterans' groups are worthy of those benefits while other groups with charitable or educational purposes are not. The fact that veterans' organizations would be permitted to engage in lobbying among their other activities [34] would not be cause for Taxation to complain of congressional discrimination favoring veterans' speech over its own. Government is free to choose the interests to which it offers support via the tax structure, even if as a result some groups are able to exercise their speech rights at a lower effective cost than are others.[35]

The foregoing would not establish the constitutionality of a measure that conditioned receipt of a benefit by one group over another on the basis of particular political views or interests, nor that of one which imposed a direct burden on protected speech. What it does establish, however, is that when Congress determines that two organizations serve significantly different purposes, or present significantly different regulatory problems, the Constitution does not require it to afford them identical treatment.

The fatal defect in the majority opinion is its failure to recognize the different regulatory considerations presented by veterans' groups [36] and 501(c)(3) organiza-

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[34] Assuming the absence of other congressional limits upon such activity. Limits of this sort in fact presently exist with respect to veterans' organizations chartered by Act of Congress. *See, e.g.*, 36 U.S.C. § 90f (1976) (DAV shall be nonpolitical and may not support any candidate for office). These are discussed at 33-34 *infra*.

[35] A contrary rule would place upon government the obligation of providing equal resources to all who would publish their views on any subject. That no such obligation exists is obvious, as the majority notes. Maj. op. at 22.

[36] Because the majority appears to agree that the statute read in conjunction with Treasury regulations does in fact restrict the lobbying activities of fraternal societies in a fashion similar to § 501(c)(3), this discussion is confined to Taxation's claims regarding veterans' groups.

tions. The majority adopts the tacit assumption that, but for the lobbying restriction, Taxation is for all relevant purposes legally indistinguishable from veterans' groups. The majority therefore draws the conclusion that the difference in treatment permitted by that restriction is discrimination touching on the fundamental right of free speech. I disagree strongly with the assumption that Taxation and veterans' groups are identically situated with respect to the purposes of Congress in conferring these tax benefits, and consequently cannot accept the conclusion the majority draws from it.

The majority appears to view veterans' organizations simply as 501(c)(3) organizations which happen for purely technical reasons to occupy a separate Code subsection, 501(c)(19). That view ignores both Congress' own understanding of the Tax Code's provisions and the unique character, status and function of veterans' groups under the laws of the United States. Insofar as these reveal important differences between veterans' groups and charitable or educational groups in general, nothing in the first or fifth amendments forecloses Congress from legislating on the basis of those differences as it has done here. Far from being essentially fungible charities, Taxation and veterans' groups are fundamentally different in their purposes, their operations, and their responsibilities under the law. Those differences lead to the conclusion that Taxation has not been subjected to unconstitutional discrimination.

The fact that veterans' groups are treated in a statutory provision (501(c)(19)) distinct from the general exemption for charitable and educational organizations in section 501(c)(3) itself tends to suggest that Congress viewed these groups as essentially different types of organizations. The majority attributes this separate treatment to purely technical reasons, namely, the need to insulate veterans' organizations from the tax imposed on unrelated business income by the Tax Reform Act of

1969. Maj. Op.. at 40. *See* S. Rep. No. 92-1082, 92d Cong., 2d Sess. (1972); H.R. Rep. No. 92-851, 92d Cong., 2d Sess. (1972). That attempted explanation is not sufficient.

First, it appears that at the time it enacted section 501(c)(19), Congress viewed veterans' organizations as falling *outside* the scope of section 501(c)(3). In stating their understanding of the existing law, the committee reports on section 501(c)(19) stated only that veterans' groups qualified as "social clubs" under section 501(c)(7) or as "social welfare organizations" under section 501(c)(4).[37] At the time Congress enacted 501(c)(19), then, it believed that veterans' groups were not classified with Taxation as 501(c)(3) groups subject to the lobbying restrictions.[38] It viewed veterans' organizations as falling into a class with groups entitled to enjoy tax-exempt status without any restriction on their political activities.

Second, the legislative evolution of the specific provisions for income, gift and estate tax deductions of contributions shows that Congress, having originally extended the benefits of exempt status and deductibility to all types of charitable and educational groups, subsequently determined to withdraw it only from section 501(c)(3) organizations that engaged in substantial attempts to influence legislation.[39] The basis for that de-

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[37] H.R. REP. No. 92-851, 92d Cong., 2d Sess. 2 (1972); S. REP. No. 92-1082, 92d Cong., 2d Sess. 2 (1972).

[38] Given this recent interpretation by Congress, the pre-1934 legislative history cited by the majority, maj. op. at 36-38, is of little value. Whatever one might make of the "pre-history" of the lobbying restriction, since 1934 Congress has without deviation taken the view that veterans' organizations and section 501(c)(3) organizations are essentially different in character.

[39] The initial focus of the decision to deny these benefits to groups that lobbied was not upon the organizations' exempt status, but upon the deductibility of contributions to them. The condition

cision need not be set forth explicity for it to be entitled to this court's respect, but the previously quoted debate on that action shows that Congress was cognizant of the distinction it was drawing.

This evolution of the present section 501(c)(3)—first extending the benefits of exemption and deductibility, later paring them back—is precisely the sort of response to social experience and legislative experiments that the Supreme Court has held most worthy of judicial deference. Contrary to the majority opinion, the rule that "reform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind"[40] is fully applicable to this case notwithstanding the presence of first amendment concerns. That is the unmistakable meaning of the Supreme Court's holding in *Buckley v. Valeo, supra*, 424 U.S. 1 (1976).

In *Buckley*, the Court was presented with a challenge to various featuures of the Federal Election Campaign Act of 1971, 2 U.S.C. § 431 *et seq.* (1976). Among the issues there presented was the claim that the provision of the Act providing for federal funding of primary election campaigns, which allowed no funds to candidates for office who did not run in primary elections, unconstitutionally discriminated against those candidates in violation of the first and fifth amendments. The Court rejected this challenge, holding that the different treatment

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placed upon exempt status which now appears in § 501(c)(3) was adopted in order to complement the denial of deductions for contributions to groups that lobby that is now § 170(c)(2)(D). *See* S. REP. No. 558, 73d Cong., 2d Sess. 30 (1934) (explaining change in exemption rules under the 1939 Code (prior § 101(6) by reference to change in deductibility under prior § 23(o)). This fact further supports the view that the principal intent of Congress in imposing the lobbying restriction was to curtail self-serving "donations" incompatible with the charitable purposes Congress sought to further.

[40] Williamson v. Lee Optical, 348 U.S. 483, 489 (1955).

was justified in view of Congress' power to structure the conduct of federal elections. The Court stated:

> [I]n deciding the constitutional propriety of the limitations in such a reform measure we are guided by the familiar principles that a 'statute is not invalid under the Constitution because it might have gone farther than it did,' *Roschen v. Ward*, 279 U.S. 337, 339, that a legislature need not 'strike at all evils at the same time,' *Semler v. Dental Examiners*, 294 U.S. 608, 610, and that 'reform may take one step at a time, addressing itself to the legislative mind,' *Williamson v. Lee Optical Co.*, 348 U.S. 483, 489.

424 U.S. at 105, *quoting Katzenbach v. Morgan*, 384 U.S. 641, 647 (1966) (footnote omitted).[41] In a footnote to this statement, the Court made explicit its holding that this understanding of Congress' power was fully applicable in first amendment cases of precisely the character that is present here. *See id.* at 105 n. 143.

The statute at issue in *Buckley* was an attempt by Congress to regulate the effects of massed private wealth upon federal elections. As such, it presented concerns lying at the very heart of the political freedom protected by the first amendment. The regulation imposed by sec-

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[41] The Court in *Buckley* cited the Campaign Act's character as a "reform" measure, *id.* at 105, 107. The courts have long recognized, as the already cited legislative history itself makes clear, that section 501(c)(3) is a similar sort of remedial measure. *See, e.g.*, Seasongood v. Commissioner, 227 F.2d 907, 910 (6th Cir. 1955); "Americans United," Inc. v. Walters, 477 F.2d 1169, 1183 (D.C. Cir. 1973) (Wilkey, J., concurring), *rev'd on jurisdictional grounds sub nom.* Alexander v. "Americans United" Inc., 416 U.S. 752 (1974). The status of an Act of Congress as a "reform" measure is a question to be determined by reference to the intent evidenced by Congress in adopting it, and not to the predilections of a reviewing court. "Evils in the same field may be of different dimensions and proportions, requiring different remedies. *Or so the legislature may think.*" Williamson v. Lee Optical, 348 U.S. 483, 489 (1955) (emphasis added).

tion 501(c)(3) can hardly be said to pose an equally or still more serious threat to those values.

When the specific actions of Congress relative to the status of veterans' groups, including its regulation of their political activities, are examined more closely than the majority is apparently willing to do, this conclusion is even more evident. Congress' decision in 1934 to limit the lobbying restriction to 501(c)(3) organizations—to take "one step at a time"—is amply supported by the contemporary and continuing "fact of American life"[42] regarding the unique status of veterans' organizations in our society. In view of this familiar social fact, Congress was clearly justified in focusing its attention on what it perceived to be the most serious abuse of the tax-exempt organization statutes, namely, the activities of the generally-described organizations presently defined in section 501(c)(3).[43]

War veterans have made unparalleled contributions to the creation and preservation of this nation. Their organizations have existed in this country from the beginning. These organizations have sought to aid disabled veterans, to assist their widows and orphans, and to provide for mutual support and assistance among those who served their country in time of war. *See generally* W. Glasson, Military Pension Legislation (1900). Some of these organizations play a vital continuing role in the administration of laws benefitting veterans, as Congress has specifically recognized and provided for. *See, e.g.*, 38 U.S.C. § 3402(a) (1976) (permitting veterans' or-

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[42] Buckley v. Valeo, 424 U.S. at 98.

[43] The fact that the reform implemented by the lobbying restriction was first adopted in 1934 does not undermine its status as a proper "first step." The various statutory changes adopted since that time—the enactment of sections 501(h) (discussed at 19-22 *supra*) and 527 (regulating political action committees)—illustrate the continuing attention paid by Congress to this area in the intervening years.

ganizations to represent veterans in presenting claims to Veterans' Administration and the furnishing of office space to them). The close coordination between veterans' organizations and the government is unique. Congress has continued to acknowledge the importance of veterans' organizations by incorporating them with federal charters in order to permit them to carry out their philanthropic purposes. *See, e.g.*, Pub. L. No. 97-83, 90 Stat. 1094 (Nov. 20, 1981) (chartering United States Submarine Veterans of World War II).[44] Because of the important and unique public role played by veterans' groups, Congress could properly regard them as a different kind of entity deserving *tax* treatment different from that accorded the more generally described charitable organizations subject to section 501(c)(3).

It could do this, as *Buckley* demonstrates, even though a perceived effect of the different treatment might be the creation of an indirect burden on other groups' first amendment interests. *Buckley* presented a regulatory provision which made the receipt of a financial benefit (campaign funding) contingent upon the past success of a candidate in primary elections.[45] That case, much more so than this one, tested a statute which made political success—and therefore, the content and consequent popularity of one's political ideas—a condition on the receipt of a benefit. The Court nevertheless upheld the provision as one enacted "in furtherance of sufficiently important governmental interests" with little practical

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[44] Other veterans' organizations are similarly incorporated. *See* note 47 *infra*.

Under standards adopted by the House and Senate Judiciary Committees, federal charters are granted only to organizations of "unique character," and which are "organized and operated solely for charitable, literary, educational, scientific, patriotic or civic improvement purposes . . . as nonpartisan and nonprofit organization[s] . . ." S. REP. No. 97-37, 97th Cong., 1st Sess. 2 (1981).

[45] Buckley v. Valeo, 424 U.S. at 97.

impact on the rights of the parties disadvantaged thereby. 424 U.S. at 95-96. Finding it evident that here, as there, "there are obvious differences in kind"[46] between veterans' organizations and section 501(c)(3) organizations, in my judgment the decision to restrict the lobbying activities of section 501(c)(3) organizations by placing a condition upon their receipt of tax benefits, without placing an identical condition upon veterans' organizations, was within the power of Congress.

Finally, it must be stressed that Congress *has in fact acted* to limit the lobbying and other political activities of the nation's more prominent veterans' groups, including the American Legion and AMVETS. The statutes governing these and other organizations of veterans chartered by Congress uniformly contain provisions barring them from engaging in partisan political activity and otherwise limiting the political involvements they may pursue. In incorporating the Disabled American Veterans, for example, Congress provided that it "shall be *nonpolitical* and nonsectarian, and as an organization shall not promote the candidacy of any person seeking public office." 36 U.S.C. § 90f (1976) (emphasis added).[47] Indeed, most recently Congress has imposed charter restrictions, *identical* to the restrictions of section 501(c)(3), upon the United States Submarine Veterans of World War II and the Italian American War Veterans of the United States. Their charters were granted in 1981 by Congress subject to the restriction that they "shall not contribute to, support or otherwise participate

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[46] *Id.*

[47] *See also* 36 U.S.C. § 46 (1976) (American Legion "shall be nonpolitical and, as an organization, shall not promote the candidacy of any person seeking public office"); *id.* § 67d ("No part of the activities of [American Veterans of World War II] shall consist of carrying on propaganda" or of supporting any political party or candidate); *id.* § 86 (Blind Veterans of World War I "shall be nonpolitical and shall not be used for the dissemination of partisan principles"); *id.* § 1153 (Paralyzed Veterans of America).

in *any* political activity *or in any manner attempt to influence legislation.*" [48]

To the extent that such direct limitations on the activities of veterans' organizations exist it is not even necessary to consider the extent to which the different treatment accorded them and section 501(c)(3) organizations within the provisions of the Tax Code is justified by the government's interest in veterans' affairs. For to that extent, veterans' groups operate under constraints essentially similar or even identical [49] to those imposed by section 501(c)(3) upon groups like Taxation, and hence no true "discrimination" in their favor occurs.[50] As the Supreme Court recently stated in *California Medical Association v. Federal Election Commission*, 101 S. Ct. 2712 (1981), in upholding section 441a(a)(1)(C) of the Federal Election Campaign Act,

> We have already concluded that § 441a(a)(1)(C) does not violate the First Amendment. In order to conclude that it nonetheless violates the equal protection component of the Fifth Amendment, we would have to find that because of this provision the Act burdens the First Amendment rights of persons subject to § 441a(a)(1)(C) to a greater extent than it burdens the same rights of corporations and unions,

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[48] Pub. L. No. 97-82 § 8(c), 90 Stat. 1092 (Nov. 20, 1981); Pub. L. No. 97-83 § 8(c), 90 Stat. 1095 (Nov. 21, 1981) (emphasis added).

[49] *See id.*

[50] This is most clearly the case in the instance of contributions sought to be deducted from the estate tax under section 2055(a)(4). That section makes contributions to veterans' organizations deductible only if the contribution is "to or for the use of any veterans' organization *incorporated by Act of Congress . . .*" Any conditions placed upon the political activities of these groups in their corporate charters, then, are *explicitly* incorporated into the provision governing the deductibility of contributions, and the effect is as if section 2055 itself imposed the restriction on political involvement.

> and that such differential treatment is not justified. *We need not consider this second question—whether the discrimination alleged by appellants is justified—because we find no such discrimination.* Appellants' claim of unfair treatment ignores the plain fact that the statute as a whole imposes far *fewer* restrictions on individuals and unincorporated associations than it does on corporations and unions.

Id. at 2724 (first emphasis added).

The restrictions imposed on the political activity of most veterans' organizations show that Congress has consistently responded to any perceived 'impurity' in the philanthropic purposes of those organizations.[51] The fact that it has chosen to do so by means other than an amendment to the Tax Code does not lessen the respect we owe its judgment. Congress is free not only to take "one step at a time" in solving a perceived problem, but also to choose different forms of solutions to such problems. "That first amendment interests are implicated should begin, not end our inquiry." *Citizens Against Rent Control v. City of Berkeley*, 102 S. Ct. 434, 444 (1981) (White, J., dissenting). As the Court stated in *California Medical Association*, even within the area of regu-

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[51] I fail to see the relevance to the lobbying restriction here under scrutiny of the majority's assertion that one veteran's organization "endorsed a presidential candidate in the 1980 election." Maj. op. 16 n.15. In actuality, it appears from the cited news source that it was a *Political Action Committee* formed by members of a veteran's organization that made the endorsement. (Wash. Post. Jan. 17, 1980). *See* N.Y. Times, Aug. 9, 1980, at 6 (*"To avoid risking its tax-exempt status,* the V.F.W. last year created a separate political action committee to back candidates." (emphasis added)). In view of the various restrictions imposed upon such committees, both under the Federal Election Campaign Act, *e.g.*, 2 U.S.C. § 441a(a)(1)(C) (1976) *and under the Tax Code itself, see* 26 U.S.C. § 527, the majority's comment is of no moment. Indeed, the restrictions imposed upon political committees go further to demonstrate the close attention given these concerns by Congress.

lations touching on protected speech, Congress may determine "that these entities have *differing structures and purposes*, and that they therefore may require different forms of regulation in order to protect the integrity of the electoral process." 101 S. Ct. at 2724 (emphasis added).

IV.

There is unanimous agreement that the lobbying restriction in section 501(c)(3) does not impose an unconstitutional burden upon the exercise of Taxation's first amendment rights. The majority holds, however, that by not imposing upon veterans' organizations an identical restriction—the threat of losing their tax benefits under the Internal Revenue Code—Congress unconstitutionally discriminated against Taxation.

In my opinion, that holding fails to accord Congress the respect it is due, even in areas where regulation may place an indirect burden on first amendment interests, when legislating to insure that the public interest is best served. To the extent it ignores the fact that Congress has used means besides the tax system to regulate the otherwise fully protected political activity of veterans' groups, the majority leaps peremptorily past the threshold question of whether section 501(c)(3) groups are in fact discriminated against *at all. California Medical Association v. FEC, supra.* To the extent that it fails to take cognizance of the gradual development of the law governing political activity by exempt organizations which began with the passage of the lobbying restriction in 1934 *and which continues into the present*[52]—with explicit solicitude for the first amendment interest at stake—the majority fails to afford Congress the respect due it in this field of endeavor. *Buckley v. Valeo, supra.*

Veterans' organizations are essentially different in character from other charitable and educational groups.

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[52] *See* 33-34 *supra.*

They are particularly distinguishable from organizations like Taxation that are avowedly incorporated and operated chiefly or exclusively for the purpose of lobbying Congress on matters of public finance. Congress, in any event, was clearly justified in drawing that distinction, and in treating what it perceived to be abuses of the tax laws as it has here. Section 501(c)(3) accomplishes that objective in a wholly content-neutral way, and is therefore consistent with the constraints of the first amendment.

While the majority attributes the system of regulation here challenged to simple congressional "inadvertence," maj. op. at 33, I would afford it the respect dictated by *Buckley* and counseled by a long and sorry history of judicial forays into the legislative province. Here, Congress has treated veterans' groups differently from the vast undifferentiated mass of organizations claiming educational and charitable purposes. It has recognized that veterans' groups are unique entities having "differing structures and differing purposes, and that they therefore may require different forms of regulation . . ." *California Medical Association, supra*, 101 S. Ct. at 2724. Nothing in the majority opinion is persuasive either of the incorrectness of that conclusion or of Congress' lack of authority to legislate on the basis of it.

I therefore respectfully dissent. Judges Robb and Wilkey join herein.

APPENDIX B

Motion Of The Veterans Of Foreign Wars Of The United States To Intervene Filed In The United States Court Of Appeals For The District Of Columbia Circuit

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 79-1464

TAXATION WITH REPRESENTATION OF WASHINGTON,
Appellant

v.

DONALD T. REGAN, SECRETARY OF THE TREASURY, *et al.*,
Appellees

MOTION OF THE VETERANS OF FOREIGN WARS OF THE UNITED STATES TO INTERVENE

I. *Background*

This Court *en banc* held in the above-styled action that the statutory scheme of allowing Federal income tax deductions for contributions to organizations such as the appellant, Taxation with Representation of Washington ("Taxation"), and to veterans' organizations such as the movant, while limiting the lobbying activities of the former but not the latter, violated the equal protection guarantee of the Fifth Amendment of the Constitution. This Court reversed the district court's decision upholding the constitutionality of the disparate treatment, but did not grant further relief. Instead, while suggesting that the proper remedy was the withdrawal of the veterans' organizations' right to participate in legislative matters, and noting that it had the power to cure the constitutional defect in that manner, this Court rejected that path, because the "veterans' organizations that

would be directly affected by nullification of preferential treatment in Section 501(c) have not heretofore been parties to this litigation." Slip Op. at 59. Moreover, this Court stated the government had failed to present affidavits or other evidentiary materials supporting the distinction to the district court. Slip Op. at 35. The case, therefore, was remanded to the district court "with the instruction that it cure the constitutionally invalid operation of Section 501(c) after inviting veterans' organizations to participate in framing the relief." Slip Op. at 60.

After the judgment of this Court was issued on March 26, 1982, the United States timely filed a Notice of Appeal to the United States Supreme Court. The Supreme Court, therefore, will consider the issues presented to this Court, prior to reconsideration by the district court. The Veterans of Foreign Wars of the United States ("VFW") now move to intervene in this case in order to represent fully the interests of its members.

The VFW is a federally chartered veterans' organization established by Act of Congress. Act of May 28, 1936, c. 471, § 1, 49 Stat. 1390, *codified* at 36 U.S.C. § 111, *et seq.* The organization is exempt from Federal income taxation, and contributions to the organization are tax deductible. *See* Sections 170 and 501(c)(19) of the Internal Revenue Code. In addition, thousands of VFW posts have been established and similarly enjoy tax-exemption and the ability to receive tax deductible contributions. *See* Internal Revenue Service Publication No. 78, Cumulative List of Organizations Described in Section 170(c) of the Internal Revenue Code (1981). The VFW engages in far-reaching activities on behalf of veterans, including efforts to secure and to maintain adequate benefits for them. The organization operates a legislative affairs office in Washington, D.C., and some of its activities involve lobbying. The organization's budget is funded, in part, by tax deductible contributions.

II. *Discussion*

Intervention by the VFW at this stage of the litigation is necessary, as a result of the appeal, rather than remand, of this Court's decision, in order to carry out this Court's mandate that veterans' organizations should participate before any final decision is made affecting their rights. There are no procedural or other considerations which would warrant denying intervention.

A. THE NECESSITY OF INTERVENTION WAS RECOGNIZED IN THE *EN BANC* DECISION OF THIS COURT

This Court recognized in its opinion that participation by veterans' organizations was appropriate before a final decision was made affecting their rights, and remanded the case to the district court with the order to invite veterans' organizations to participate in the litigation before framing relief.

The remand to the district court contemplated by the opinion, however, will not at this time occur and the case will first be considered by the Supreme Court. The Supreme Court may determine that the statutory scheme is constitutional. If not, the Supreme Court, like this Court, has jurisdiction to fashion relief to cure the unconstitutionality and completely dispose of the case. *See e.g., Welsh v. United States*, 398 U.S. 333, 361-65 (1970) (Harlan, J., concurring); *Skinner v. Oklahoma*, 316 U.S. 535, 543 (1942); *Iowa-Des Moines National Bank v. Bennett*, 284 U.S. 239, 247 (1931). Unlike this Court, however, the Supreme Court, even if it agrees with this Court on the constitutional issue, may decide not to defer to the district court and may decide to frame appropriate relief. Consequently, the precise concern that gave rise to the mandate to the district court to invite veterans' groups to participate remains present, despite the change in the procedural posture of the case from remand to the district court to appeal to the Supreme

Court. In order to carry out this Court's decision requiring participation by veterans' organizations before any final decision affecting their rights, intervention at this stage in the litigation is essential.

B. THERE ARE NO PROCEDURAL OR OTHER CONSIDERATIONS REQUIRING DENIAL OF THE MOTION TO INTEVRENE

This Court has held, and the Supreme Court has agreed, that a motion to intervene may be granted after final judgment has been issued. *See International Union, Local 283 v. Scofield*, 382 U.S. 205 (1965); *Wolpe v. Poretsky*, 144 F.2d 505 (D.C.Cir.), *cert. denied*, 323 U.S. 777 (1944). In *Scofield*, the Supreme Court, albeit in an opinion explicitly "limited to Labor Board review proceedings," 382 U.S. at 216,[1] suggested that the standards to apply in determining whether intervention should be allowed after a judgment has been issued were those expressed in Rule 24 of the Federal Rules of Civil Procedure. Rule 24 requires that an application for intervention must show (i) an interest in the subject matter of the action, under one of the two standards outlined below, (ii) that the interest is not adequately represented by an existing party, and (iii) that it is timely.

1. *The VFW's Interests In The Litigation Satisfy The Standards of Rule 24*

Rule 24 provides standards for both intervention as a matter of right and permissive intervention. Intervention is a matter of right under Rule 24(a)(2), if the

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[1] The opinion was so limited in recognition that "in considering the propriety of intervention in the courts of appeals . . . Federal agencies are not fungibles for intervention purposes—Congress has treated the matter with attention to the particular statutory scheme and agency." International Union, Local 287 v. Scofield, 382 U.S. 205, 207 (1965). Neither the Congress nor the Court has specifically provided for a case such as the one here involved. Therefore, the approach taken in *Scofield*, while not determinative, is certainly instructive.

applicant claims "an interest relating to the property or transaction which is the subject of the action and he is so situated that disposition of the action may as a practical matter impair or impede his ability to protect that interest." Permissive intervention pursuaunt to Rule 24(b) is appropriate when the prospective intervenor's "claim or defense and the main action have a question of law of fact in common." The VFW satisfies both the more restrictive standard for intervention as a matter of right and the standard for permissive intervention.[2] The VFW is so situated that disposition of this action by the Supreme Court may preclude its ability to protect its interest in continuing its legislative activities.[3] Therefore, under either of the standards of Rule 24, this Court should grant the VFW's Motion to Intervene.

This Court's decision that the distinction drawn within Section 501(c) violated certain constitutional guarantees does not necessarily require the limitation of lobbying activity by organizations such as the VFW. If the Supreme Court ultimately agrees with this Court's resolution of the constitutional issue and determines the remedy

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[2] The right of veterans' organizations to engage in legislative activities is at the heart of the issue concerning both the constitutionality of the existing statutory scheme and the appropriate remedy necessary to preserve constitutionality. Such commonality satisfies the standards for permissive intervention under Rule 24(b).

[3] This Court, interpreting the interest requirement imposed by Rule 24(a), has stated that

> [w]e know of no concise yet comprehensive definition of what constitutes a litigable "interest" for purpose of standing and intervention under Rule 24(b) . . . . We know [that] the "interest" test is primarily a practical guide to disposing of law suits by involving as many apparently concerned persons as is compatible with efficiency and due process.

Nuesse v. Camp, 385 F.2d 694, 700 (D.C. Cir. 1967). The VFW, which stands to lose an important benefit if the present proceeding is decided against its interests, satifies this test.

in accordance with the plain suggestion of Judge Mikva's opinion for this Court, however, the effect of the Supreme Court's order would be to restrict the lobbying activities of the VFW. The VFW's current taxable status might be altered, and the lobbying activities in which it currently engages free of governmental intervention would be subjected to governmental supervision and question. If this Motion to Intervene is not granted, the VFW will be unable to participate fully prior to the possible withdrawal of an important benefit. These adverse effects, and the possibility that the issues considered by this Court in its *en banc* decision will be resolved without the participation of a plainly affected group such as the VFW, satisfy the requirements of Rule 24 and the policies underlying appellate intervention.[4]

2. *The Interests Of The VFW Are Not Adequately Represented By The Existing Parties*

In addition to requiring that the claims of the intervenors be closely related to those at issue in the pending case, Rule 24(a)(2), requires that the prospective intervenor's interest not be adequately represented by any of the existing parties.[5]

Taxation obviously has interests that conflict with the VFW and it cannot adequately represent the VFW's interest in this litigation. Taxation has taken the position that the distinction drawn between the lobbying provisions relating to charitable organizations, such as Taxation, and those that apply to veterans' groups is violative

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[4] Moreover, this Court discussed in detail the activities of the VFW, without the benefit of the organization's participation. The opinion contains certain factual inaccuracies, *see, e.g.*, slip op. at pp. 10-15, and, prior to further judicial consideration of its activities, the VFW has an interest in presenting the facts surrounding its operations as well as its views of the underlying law.

[5] The standards for permissive intervention set forth in Rule 24(b) contain no such requirement of inadequate representation by the parties.

of the fifth amendment. The VFW expects to argue that the statutory scheme is not violative of any constitutional provision. Moreover, the relief requested of this Court by Taxation, while not diametrically opposed to the interests of the VFW, is not identical to the position the VFW expects to take.

The United States, while it has filed a Notice of Appeal and has supported the constitutionality of the distinction drawn by Congress, also fails to represent adequately the interests of the VFW. The VFW, as a veterans' organization that has operated since 1914, is in a better position than is the government to articulate the interests justifying disparate treatment for such organizations. Moreover, since the Supreme Court may resolve the question of remedy left open by this Court, neither the United Stats nor Taxation can represent adequately the interests of the VFW.

If the statutory scheme at issue is finally found to be unconstitutional, the United States, consistent with its obligations, might determine that the proper method of curing the constitutional defect is to impose restrictions on the lobbying activity of veterans' organizations. The VFW, however, believes that the proper remedy, assuming that one is required, is to eliminate any constitutional defect without disturbing veterans' organizations' right to engage in legislative activities. Taxation also has no direct interest in minimizing restrictions on veterans' organizations, but only an interest in being permitted to lobby. This incongruity of interest alone satisfies the burden of proving that the existing parties do not adequately represent the interest of the VFW within the meaning of Rule 24(a)(2). *See, e.g., Foster v. Guerny*, 655 F.2d 1319 (D.C. Cir. 1981).

Finally, the fact that The Disabled American Veterans, The Paralyzed Veterans of America, and The American Legion have filed motions to intervene does not diminish the VFW's own right to intervene. First, this Court

has not yet granted any of the pending motions. These three veterans' organizations, therefore, are not "existing parties" within the meaning of Rule 24. Second, the VFW has an independent interest in participating in subsequent proceedings before this Court, the Supreme Court, and the district court. There are significant differences in operation and funding among the veterans' organizations seeking to intervene.[6] In addition, the opinion of this Court specifically described, in some respects erroneously, activities of the VFW and the manner in which it is organized and operated. Slip Op. at pp. 12 and 16, n.15. *See also* Slip Op. at p. 35, n.51 (MacKinnon, J., dissenting). The VFW seeks the opportunity to present fully the circumstances surrounding its operations, prior to further judicial consideration of its operation or the underlying legal issues. Therefore, the VFW has an independent reason for, and interest in, participating in any further proceedings, regardless of the ultimate participation of the other veterans' organizations.

3. *The Motion To Intervene Satisfies the Timeliness Requirement Of Rule 24*

The final requirement of both sections of Rule 24 is that the application be "timely" filed. The question of timeliness "does not depend solely upon the amount of time that may have elapsed since the institution of the action . . . ." 3B Moore's Federal Practice ¶ 24.13[1].[7]

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[6] Moreover, the Disabled American Veterans and the Paralyzed Veterans of America qualify under Section 501(c)(4) while the VFW is exempt under Section 501(c)(19).

[7] The United States Court of Appeals for the Fifth Circuit, illustrating the flexibility inherent in the timeliness requirement of Rule 24, stated that

> "[t]imeliness" is not a word of exactitude or of precisely measurable dimensions. The requirement of timeliness must have accommodating flexibility toward both the court and the

"The critical inquiry . . . is whether in view of all the circumstances the intervenor acted promptly after the entry of final judgment." *United Airlines, Inc. v. McDonald*, 432 U.S. 385, 395-396 (1977). In considering whether a motion to intervene has been timely filed, courts consider the purpose of, the necessity for, and the probability of prejudice from intervention. *See Hodgson v. United Mine Workers*, 473 F.2d 118, 130 (D.C. Cir. 1972).

The VFW has acted promptly after entry of judgment and there will be no prejudice to existing parties that warrants denial of the motion.[8] The VFW has never been notified by either the district court, or this Court, that disposition of Taxation's action would potentially deprive it of a valuable benefit. Once the opinion and judgment of this Court were rendered, however, the VFW realized the possibility that it would be aggrieved by the ultimate decision, but was left without a vehicle to challenge the finding that the statutory scheme was unconstitutional.

A certified copy of the judgment and a copy of the opinion of this Court were issued to the district court on April 8, 1982. On April 16, 1982, however, this Court, pursuant to the untimely-filed Motion of the United States for Stay of Mandate,[9] recalled the mandate, pending the filing of a Notice of Appeal to the Supreme Court, and stayed its issuance for 30 days. During that period, the VFW had no appropriate vehicle through which to challenge the constitutional finding of this Court.

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litigants if it is to be successfully employed to regulate intevention in the interest of justice.

McDonald v. E. J. Lavino Co., 430 F.2d 1065, 1074 (5th Cir. 1970). Application of the requirement, in light of its imprecision, is left to the court's discretion.

[8] The purpose and need for intervention has already been considered. *Supra*, pp. 9-12.

[9] This Court construed the untimely Motion for Stay of Mandate as a motion to recall the mandate previously issued.

The Government filed a Notice of Appeal on April 23, 1982, thereby making it apparent that the Supreme Court would consider the case prior to the remand contemplated by this Court's opinion and judgment. The VFW obtained counsel on Thursday, April 29, 1982, and has now filed this Motion to Intervene. The VFW thus acted promptly to intervene once it became apparent that matter would be considered by the Supreme Court.

Various courts have stated that prejudice to the existing parties, in addition to the promptness with which the prospective intervenor acts, is an important consideration in determining whether a motion to intervene is timely filed. *See e.g., McDonald v. E. J. Lavino Co.*, 430 F.2d 1065, 1073 (5th Cir. 1970). *See generally*, C. Wright and A. Miller, Federal Practice: Civil § 1916 (1972); Note, The Requirement of Timeliness Under Rule 24 of the Federal Rules of Civil Procedure, 37 Va. L. Rev. 863, 867 (1951). Intervention by the VFW will not prejudice the existing parties.

The VFW's intervention will not delay the proceedings before the Supreme Court. After filing a Notice of Appeal, pursuant to 28 U.S.C. § 2101(a), the Government has sixty days in which "the record shall be made up and the case docketed . . . ." 28 U.S.C. § 2101(a). *See also* United States Supreme Court Rule 13.1. The Government has not yet docketed the case by filing its jurisdictional statement, *see* 28 U.S.C. §§ 1252 and 2101(c), and this motion has therefore been filed substantially prior to the time that any documents are due to be filed in the Supreme Court. The VFW is thereby able to file timely all briefs and motions to this Court and to the Supreme Court. Granting the VFW's Motion to Intervene, therefore, would not prejudice the other parties by delaying the disposition of this appeal by the Supreme Court.

Moreover, no other prejudice will result from granting this Motion to Intervene. For example, the potential

prejudice from undue complexity resulting from multiple parties, often important at the trial level, is not present in appellate proceedings before this Court or the Supreme Court.

Finally, Taxation, the party whose interests in the constitutional issue are invariably adverse to the VFW, has authorized counsel to represent to this Court that it will file no objection to this motion. Counsel for the VFW also understands that the Government is presently considering its position with respect to the motions to intervene filed by various veterans' organizations. The potential acquiescence of both existing parties, while not essential, is evidence of the absence of prejudice resulting from the VFW's intervention.

C. THIS COURT HAS JURISDICTION TO CONSIDER THIS MOTION

This Court has jurisdiction to consider a motion to Intervene filed after a Notice of Appeal to the United States Supreme Court has been filed pursuant to 28 U.S.C. § 2101, but before the action has been there docketed. An appeal is not considered docketed in the Supreme Court until the appellant has filed its jurisdictional statement. 28 U.S.C. §§ 1252 and 2101.

Supreme Court Rules 14.1 and 14.2 plainly recognize that a court, from which an appeal is taken to the Supreme Court, has continuing jurisdiction until the case is "docketed" in the Supreme Court. Those Rules provide that either the appellant or the appellee may file a motion to dismiss the appeal in the court possessed of the record, and that court may grant the motion.[10] Of

[10] Rule 14.2 provides further that the court acting on such a motion "may make such order thereon with respect to the costs that may be just." This rule further illustrates that the court of appeals has continuing power to grant motions with respect to a case that has been appealed to, but not docketed in, the Supreme Court.

course, this Court, until this case is docketed in the Supreme Court pursuant to 28 U.S.C. § 2101, remains possessed of the record. It is thus apparent that this Court has jurisdiction, even after a Notice of Appeal has been filed,[11] to consider a motion to intervene.[12]

III. *Conclusion*

Having satisfied all the requirements for intervention, the VFW respectfully requests that this Court grant this Motion to Intervene.[13]

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[11] While a district court is, in most instances, deprived of jurisdiction once a notice of appeal to the court of appeals has been filed, *see Hobson v. Hansen*, 44 F.R.D. 18 (D. D.C. 1968); *see generally*, J. Moore, Moore's Federal Practice and Procedure ¶ 203.11, two distinctions exist between appeals to the courts of appeals and those to the Supreme court. First, unlike appeals to the Supreme Court, appeals to the courts of appeals are docketed, and the records are transmitted, almost simultaneously with the filing of the notice of appeal in the district court. *See* Fed. R. App. Pro. 3(d) and 12(a). Second, the Supreme Court possesses greater discretion, even with respect to its appeals jurisdiction, than does the court of appeals.

[12] Once the case is docketed in the Supreme Court, however, the court of appeals has no power to act on any matter raised with respect to the action. *See Benson v. Beens*, 456 F.2d 244 (8th Cir. 1972); *Scherpp v. School District of Abington*, 184 F.Supp. 381 (E.D. Pa. 1960) (three-judge district court).

[13] As required by Rule 6(i) of the United States Court of Appeals for the District of Columbia Circuit Rules, movant requests expeditious consideration of this Motion. Movant believes that such consideration is necessary to permit it to file timely the jurisdictional statement in the Supreme Court, if this motion is granted, or to reserve the possibility of making this motion to the Supreme Court, if this Court denies it.

Respectfully submitted,

/s/ Sheldon S. Cohen
SHELDON S. COHEN
HENRY G. ZAPRUDER
RICHARD D'AVINO

COHEN AND URETZ
1775 K Street, N.W.
Suite 400
Washington, D.C. 20006
Telephone: (202) 835-7300

Counsel for The
Veterans of Foreign
Wars of the United States

Of Counsel:

Wilmer S. Schantz, Jr.
6736 Old McLean Village Drive
McLean, Virginia 22101

George H. Gangwere
Lawrence M. Maher
Swanson, Midgley, Gangwere,
Clarke & Kitchin
1500 Commerce Bank Building
Kansas City, Missouri 64106

Dated: May 3, 1982

CERTIFICATE OF SERVICE

I hereby certify that the foregoing Motion of The Veterans of Foreign Wars of the United States to Intervene has been served on Appellee and Appellant, and on the other applicants for intervention, by mailing a copy thereof, first-class, postage prepaid, to:

Rex E. Lee, Solicitor General of the United States
Room 5614
Department of Justice
Washington, D.C. 20530
(Counsel for Government-Appellees)

John C. Sims, Esquire
Suite 700
2000 P Street, N.W.
Washington, D.C. 20036
(Counsel for Taxation With Representation of Washington)

Joseph C. Zengerle, Esquire
Bingham, Dana & Gould
Suite 40
1724 Massachusetts Avenue, N.W.
Washington, D.C. 20036
(Counsel for Disabled American Veterans and Paralyzed Veterans of America)

Mitchell, Rogovin, Esquire
Rogovin, Huge & Lenzer,
A Professional Corporation
1730 Rhode Island Avenue, N.W.
Washington, D.C. 20036
(Counsel for The American Legion)

/s/ Sheldon S. Cohen
SHELDON S. COHEN

Dated: May 3, 1982

APPENDIX C

Order Of The United States Court Of Appeals For The District Of Columbia Circuit Denying The Motions To Intervene

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

SEPTEMBER TERM, 1981

Civil Action No. 78-0834

No. 79-1464

TAXATION WITH REPRESENTATION OF WASHINGTON,
Appellant

v.

DONALD T. REGAN, SECRETARY OF TREASURY, *et al.*

Before: Robinson, Chief Judge; Wright, Tamm, MacKinnon, Robb, Wilkey, Wald, Mikva, Edwards, and Ginsburg, Circuit Judges

ORDER

Upon consideration of the motion of Disabled American Veterans and Paralyzed Veterans of America for leave to intervene, the motion of American Legion to intervene and for expeditious determination of this motion, the motion and corrected motion of Veterans of Foreign Wars of the United States for leave to intervene, appellees' (federal) opposition to motions for intervention, and the replies of Disabled American Veterans and Paralyzed Veterans of America and American Legion to the aforesaid opposition, it is

ORDERED, by the Court, that the aforesaid motions to intervene are denied and the Clerk is directed to note the docket accordingly.

Per Curiam
FOR THE COURT:

/s/ George A. Fisher
GEORGE A. FISHER
Clerk

APPENDIX D

Docket Sheet Of The United States Court Of Appeals For The District Of Columbia Circuit

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 79-1464

TAXATION WITH REPRESENTATION OF WASHINGTON,
Appellant

v.

DONALD T. REGAN, SECRETARY OF TREASURY, *et al.*

Appeal from the District Court

DOCKET ENTRIES

DATE	FILINGS—PROCEEDINGS
(D)5-7-79	Certified Original Record (1 vol.) (n-2)
(D)6-8-79	4-Appellant's motion to extend time to file brief to 7-18-79 (m-8)
(E)6-13-79	Clerk's order granting appellant's motion to extend time to file brief to July 18th
(D)7-12-79	4-Appellant's motion for leave to file motion to extend time to file brief (m-12)
(E)7-17-79	Clerk's order granting appellant's motion for leave to file motion to extend time to file brief and granting motion to August 1, 1979
(E)7-17-79	4-Appellant's motion to extend time to file brief—granted
(T)8-1-79	15-Appellant's brief (m-1)
(T)8-1-79	7-Appendix (m-1)
(D)9-5-79	15-Appellees' brief (m-4)
(T)9-24-79	15-Appellant's reply brief (m-21)
(T)3-7-80	Clerk's order, sua sponte, that the following times are allotted for oral argument: Appellant—15 minutes; appellee—15 minutes; only one counsel per side will be allowed to argue

DATE	FILINGS—PROCEEDINGS
(T) 3-10-80	4-Letter from counsel for appellant advising of additional authorities pursuant to Rule 28(j), FRAP (m-10)
(E) 3-18-80	Argued before MacKinnon, Robb* and Mikva, CJ's
(D) 7-21-80	4-Letter from counsel for appellant advising of additional authorities pursuant to Rule 28(j), FRAP (m-18)
(H) 4-14-81	Opinion for the Court filed by Circuit Judge Mackinnon
(H) 4-14-81	Dissenting Opinion filed by Circuit Judge Mikva.
(H) 4-14-81	Judgment affirming the judgment of the District Court, and appellant's constitutional challenge to the IRS's denial of § 501(c)(3) status is rejected, all in accordance with the Opinion for the Court filed herein this date. Vacated 6-11-81 order
(T) 04-22-81	1-Appellees' bill of costs (m-20)
(T) 04-28-81	15-Appellant's petition for rehearing and suggestion for rehearing en banc (m-28)
(B) 05-04-81	Clerk's order, sua sponte, that pursuant to Rule 43 of the F.R.A.P., the Clerk is directed to delete the name of W. Michael Blumenthal as a party appellee and to substitute therefore the name of Donald T. Regan
(R) 6-1-81	Per Curiam order sua sponte, that the Opinion for the Court filed by Circuit Judge MacKinnon in this case on April 14, 1981 be and it hereby is amended as follows (See Order for details)
(C) 06-11-81	Per Curiam order, en banc, that the majority opinion, dissenting opinion and judgment all entered 4/14/81 be and same are hereby

DATE	FILINGS—PROCEEDINGS
	vacated; The parties are directed to submit 25 additional copies of each brief previously filed and 25 additional copies of joint appendix, both no later then 7/30/81; Parties are further directed to submit 30 copies of a supplemental brief on rehearing containing argument based upon any new authorities, comment upon the panel opinion and further argument addressed to the following issues: (1) The appropriate standard of review; (2) Whether a distinction between veterans and fraternal societies, on the one hand, and other § 501(c)(3) organizations, on the other, is Constitutionally justifiable; The supplemental briefs on rehearing shall be filed in accordance with the following schedule: Appellant—7/20/81; Appellees—8/31/81; Oral argument before the en banc Court will be heard on 10/14/81; CJ Robinson; Wright, McGowan, Tamm, MacKinnon, Robb, Wilkey, Wald, Mikva, Edwards and Ginsburg, CJs (CJ Tamm, MacKinnon and Robb would not rehear this matter en banc)
(G) 07-21-81	25-Appellant's supplemental brief on rehearing en banc (m-20)
(G) 08-27-81	25-Appellees' supplemental brief on rehearing en banc (m-26)
(G) 10-05-81	Clerk's order, sua sponte, that the following times are allotted for the oral argument of this case: Appellant—25 minutes; Appellees—25 minutes.
(G) 10-14-81	Argued En Banc, before, CJ Robinson, Wright, Tamm, MacKinnon, Robb, Wilkey, Wald, Mikva, Edwards and Ginsburg, CJs
(V) 12-29-81	15-Letter from counsel for appellant advising of additional authorities pursuant to FRAP 28(j) (m-29)

DATE	FILINGS—PROCEEDINGS
(S) 03-26-82	Opinion for the Court filed by CJ Mikva
(S) 03-26-82	Dissenting opinion filed by CJ MacKinnon
(S) 03-26-82	Judgment that the judgment of the District Court is reversed and the case is remanded for further proceedings consistent with the opinion filed
(S) 04-08-82	Certified copy of judgment and copy of opinion issued to District Court
(C) 04-08-82	1-Appellant's bill of costs (m-7)
(C) 04-13-82	Receipt date 4/13/82 from Clerk, District Court for 1 vol. original record
(C) 04-16-82	4-Appellees' motion for stay of mandate (m-16)
(C) 04-23-82	15-Motion of Disabled American Veterans and Paralyzed Veterans of America for leave to intervene (m-23)
(C) 04-23-82	4-Notice of appeal to Supreme Court by Donald T. Regan, Sec. of Treasury, et al. (m-23)
(C) 04-23-82	4-Notice of appeal of Disabled American Veterans and Paralyzed Veterans of America (m-23)
(V) 04-29-82	Per Curiam order that appellees' motion for stay of mandate, construed as a motion to recall mandate, be, and it is hereby granted. The Clerk of the U.S. District Court for the District of Columbia is directed to return the mandate previously issued herein on April 8, 1982, as promptly as the business of his office permits and the Clerk of this Court is directed not to reissue the mandate herein for a period of 30 days from the date of this order; CJ Robinson, Wright, Tamm, MacKinnon, Robb, Wilkey, Wald, Mikva, Edwards and Ginsburg, CJs

Office - Supreme Court, U.S.
FILED
JUL 23 1982
ALEXANDER L. STEVAS,
CLERK

No. 81-2338

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

DONALD T. REGAN, SECRETARY OF THE TREASURY, *et al.*,
Appellants,

v.

TAXATION WITH REPRESENTATION OF WASHINGTON,
Appellee.

On Appeal From The United States Court Of Appeals For The District Of Columbia Circuit

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BRIEF OF THE AMERICAN LEGION AS AMICUS CURIAE IN SUPPORT OF JURISDICTION

---

* MITCHELL ROGOVIN
GEORGE T. FRAMPTON, JR.
VICKI C. JACKSON

ROGOVIN, HUGE & LENZNER
A Professional Corporation
1730 Rhode Island Avenue, N.W.
Suite 1100
Washington, D.C. 20036

* Counsel of Record

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

TABLE OF CONTENTS

	Page
INTEREST OF AMICUS CURIAE	1
SUMMARY OF ARGUMENT	3
ARGUMENT	4
I. THE COURT BELOW ERRED IN HOLDING THAT THE LOBBYING RESTRICTIONS IN § 501(c)(3) VIOLATE THE EQUAL PROTECTION CLAUSE	4
A. The Court Of Appeals Erred In Holding That These Tax Classifications Could Be Sustained Only By A Compelling Government Interest	4
B. Even Under A More Rigorous Standard Of Review, The Distinction Between Veterans Organizations And § 501(c)(3) Organizations Should Be Sustained	8
II. THE REMAND ORDERED BY THE COURT OF APPEALS PRESENTS SUBSTANTIAL STATUTORY AND CONSTITUTIONAL QUESTIONS	13
CONCLUSION	20

TABLE OF AUTHORITIES

Cases	Page
Alexander v. "Americans United" Inc., 416 U.S. 752 (1974)	14
Aptheker v. Secretary of State, 378 U.S. 500 (1964)	18
Basic Unit Ministry of Schurig v. Commissioner, 670 F.2d 1210 (D.C. Cir. 1982)	15
Bob Jones University v. Simon, 416 U.S. 725 (1974)	14
Buckley v. Valeo, 424 U.S. 1 (1976)	6, 8
Califano v. Westcott, 443 U.S. 76 (1979)	16-19
Cammarano v. United States, 358 U.S. 498 (1959)	7, 9
Clements v. Fashing, 50 U.S.L.W. 4869 (U.S. June 25, 1982)	7
CREATE, Inc. v. Commissioner, 634 F.2d 803 (5th Cir. 1981)	15
Hansberry v. Lee, 311 U.S. 32 (1940)	18
Harris v. McCrae, 448 U.S. 297 (1980)	7
Haswell v. United States, 500 F.2d 1133 (Ct. Cl. 1974), *cert. denied*, 419 U.S. 1107 (1975)	9
Iowa-Des Moines National Bank v. Bennett, 284 U.S. 239 (1931)	17
Jefferson v. Hackney, 406 U.S. 535 (1972)	7
Kahn v. Shevin, 416 U.S. 351 (1974)	5
Lehnhausen v. Lake Shore Auto Parts Co., 410 U.S. 356 (1973)	5
Maher v. Roe, 432 U.S. 464 (1977)	7
National Alliance v. United States, 81-1 U.S.T.C. ¶ 9464 (D.D.C. 1981)	15
Rogers v. County of Hennepin, 240 U.S. 184 (1916)	5
San Antonio Independent School District v. Rodriguez, 411 U.S. 1 (1973)	4, 7
Simon v. Eastern Kentucky Welfare Rights Organization, 426 U.S. 26 (1976)	18
Skinner v. Oklahoma ex rel. Williamson, 316 U.S. 535 (1942)	17, 18
Slee v. Commissioner, 42 F.2d 184 (2d Cir. 1930)	5

TABLE OF AUTHORITIES—Continued

	Page
Southwest Virginia Professional Standards Review Organization, Inc. v. United States, 78-2 U.S.T.C. ¶ 9747 (D.D.C. 1978)	15
United States v. Maryland Savings-Share Insurance Corp., 400 U.S. 4 (1970)	4
United States v. Robel, 389 U.S. 258 (1967)	17, 19
Virginia Professional Standards Review Foundation v. Blumenthal, 466 F. Supp. 1164 (D.D.C. 1979)	15
Welsh v. United States, 398 U.S. 333 (1970)	16, 17
Williams v. Rhodes, 393 U.S. 23 (1968)	18
Williamson v. Lee Optical, Inc., 348 U.S. 483 (1955)	6

Statutes

26 U.S.C. § 170	2, 15, 20
26 U.S.C. § 501(c)(3)	*passim*
26 U.S.C. § 501(c)(4)	2, 15, 20
26 U.S.C. § 501(c)(19)	2, 6, 15, 20
26 U.S.C. § 501(h)	6, 11, 17, 20
26 U.S.C. § 501(h)(2)(A)	11
26 U.S.C. § 2055	2
26 U.S.C. § 2522	2
26 U.S.C. § 4911(d)(2)(B)	11
26 U.S.C. § 7421(a)	13
26 U.S.C. § 7428	4, 13-15, 20
26 U.S.C. § 7428(a)(2)	13
26 U.S.C. § 7428(b)(1)	13
28 U.S.C. § 2201	13
36 U.S.C. §§ 41-51	1, 10
36 U.S.C. § 45	1
36 U.S.C. § 49	11
36 U.S.C. §§ 1101-1103	11
Pub. L. No. 66-47, 41 Stat. 284 (1919)	1
Pub. L. No. 67-98, 42 Stat. 227 (1921)	2

Rules

Sup. Ct. R. 28.1	1
Sup. Ct. R. 36	1

TABLE OF AUTHORITIES—Continued

Legislative Materials Page

78 Cong. Rec. (1934)

5861 5

5959 5

Legislative Activity By Certain Types of Exempt Organizations, Hearings Before the House Ways and Means Committee, 92d Cong., 2d Sess. (1972) 6, 9, 10

General Tax Reform, Hearings Before the House Ways and Means Committee, 93d Cong., 1st Sess. (1973) 6, 10

Proposals for Administrative Changes in Internal Revenue Service Procedures, Hearings Before the Subcommittee on Oversight of the House Ways and Means Committee, 94th Cong., 1st Sess. (1975) 10, 14

Influencing Legislation By Public Charities, Hearing Before the House Ways and Means Committee, 94th Cong., 2d Sess. (1976) 6, 9, 17, 19

S. Rep. No. 1082, 92d Cong., 2d Sess. (1972) 6

S. Rep. No. 938, 94th Cong., 2d Sess. (1976) 15

Miscellaneous

2 Cum. Bull. 152 (1920) 5

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

No. 81-2338

DONALD T. REGAN, SECRETARY OF THE TREASURY, *et al.*,
Appellants,

v.

TAXATION WITH REPRESENTATION OF WASHINGTON,
Appellee.

On Appeal From The United States Court Of Appeals For The District Of Columbia Circuit

BRIEF OF THE AMERICAN LEGION AS AMICUS CURIAE IN SUPPORT OF JURISDICTION

INTEREST OF AMICUS CURIAE [1]

The American Legion, chartered by Special Act of Congress in 1919, Pub. L. No. 66-47, 41 Stat. 284, is the largest organization of veterans in the United States. Its membership, as set forth in that statute and amended from time to time by the Congress, *see generally* 36 U.S.C. §§ 41-51, is restricted to those who have served in the military services during World Wars I or II, or the Korean or Vietnam conflicts, provided that they were honorably discharged or separated, or continued to serve honorably, 36 U.S.C. § 45. In addition to its 2,400,000 members, the Legion is made up of 15,800 posts located in states across the country and in seven foreign countries.[2]

[1] Pursuant to Supreme Court Rule 36, written consent to the filing of this Brief has been obtained from counsel for all parties, and the letters of consent have been filed with the Clerk.

[2] In compliance with Supreme Court Rule 28.1, the Legion states that its 15,800 affiliated posts and 58 Departments (seven of which are in foreign countries) all bear the words "American Legion" in

The Legion and its subsidiaries are exempt from federal income taxation under § 501(c)(19) of the Internal Revenue Code of 1954 (as amended), 26 U.S.C. § 501(c)(19),[3] and contributions to the Legion are deductible for income tax purposes under § 170 and for gift and estate tax purposes under §§ 2522 and 2055 of the Code. 26 U.S.C. §§ 170, 2055, 2522. The Legion has a legislative program relating to specified issues of direct interest to its members, and receives a small portion of its income from deductible bequests or contributions.

In its *en banc* decision, the Court of Appeals recognized that its ruling vitally affected the interests of veterans groups. After concluding that there was a constitutionally objectionable "differential" in tax treatment of § 501(c)(3) organizations and veterans organizations, the Court of Appeals concluded that "[t]he most obvious remedy—striking down the Section 501(c)(3) lobbying limitation that now governs Taxation [appellee]—poses the most obvious problems," App. 73a,[4] and therefore remanded the case to the District Court with a strong suggestion that "the preferential treatment now accorded the lobbying of veterans' organizations" be eliminated. App. 76a.

If this Court were to affirm the Court of Appeals' conclusion that any disparity in treatment between veterans groups and other non-profit organizations is in fact unconstitutional, or its suggested remedy, it is plain that

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their titles. The American Legion also recognizes as an auxiliary organization "The American Legion Auxiliary," an Indiana corporation. The Legion has no parents, subsidiaries or affiliates other than as set forth above.

[3] Prior to the enactment of § 501(c)(19), the Legion was recognized as tax exempt under § 501(c)(4). Since 1921, contributions to the Legion and its posts and auxiliaries have been deductible from the taxable income of the contributors. Pub. L. No. 67-98, § 214(a)(11), 42 Stat. 227, 241 (1921).

[4] Citations to the decision of the Court below, reprinted in the Appendix to the Government's Jurisdictional Statement, are cited as "App. ——."

the Legion's current tax status and freedom from restraint as to legislative activity would be substantially and seriously impaired. Amicus thus has a vital interest in the disposition of this case.

SUMMARY OF ARGUMENT

I. Tax code classifications subject to equal protection challenge will generally be sustained if they rationally further a legitimate purpose. Under this standard, the numerous differences in treatment under the Internal Revenue Code between veterans organizations and other exempt organizations, including restrictions on lobbying activity, plainly pass constitutional muster. The predicate for the Court of Appeals' contrary holding was a simple misreading of the legislative history concerning lobbying restrictions on § 501(c)(3) organizations, which shows that Congress deliberately limited the lobbying restrictions to those organizations. And the Court of Appeals' erroneous conclusion that traditional equal protection scrutiny will not suffice here is inconsistent with this Court's decisions that government subsidies affecting fundamental rights need not meet the "compelling interest" test.

Even a more rigorous review of this classification will show that veterans organizations do not pose the kinds of dangers with which Congress was concerned in imposing lobbying restrictions on § 501(c)(3) organizations. The major veterans organizations, like the American Legion, are congressionally chartered and subject to special audit and reporting requirements. Such organizations tend to have controls assuring that constituent members' views are fairly represented and, unlike many § 501(c)(3) organizations, do not depend heavily for their financial support on contributions from a floating general public. Thus, a substantial basis exists for concluding that the special dangers posed by § 501(c)(3) organizations engaging in lobbying—to wit, private interest lobbying by wealthy individuals who, by virtue of substantial deductible contributions, could control small § 501(c)(3)

organizations lacking effective membership control—were not present in lobbying by veterans organizations. Regardless of whether the standard of review is a mere rationality standard, or something more rigorous, no equal protection violation is present.

II. The remedial order of the Court of Appeals was, in any event, erroneous. This case was brought under § 7428 of the Internal Revenue Code, which limits the relief that a district court may grant to a declaratory judgment whether the Service's denial of an application for § 501(c)(3) status was proper. If the legislative scheme *were* unconstitutional, respondent would simply have been entitled to a declaratory judgment that the Secretary had wrongly denied its application for § 501(c)(3) status. It would then be left to Congress to determine whether it wished to remedy the statute by eliminating the § 501(c)(3) lobbying restrictions, by extending restrictions to veterans organizations, or through some other means. The Court of Appeals' remand order suffers a constitutional defect as well, since it amounts to a virtual command that the District Court ignore the constitutional limitations on its authority, invade the prerogatives of the legislative branch, and engage in the kind of policy judgments that are preeminently legislative tasks.

I. THE COURT BELOW ERRED IN HOLDING THAT THE LOBBYING RESTRICTIONS IN § 501(c)(3) VIOLATE THE EQUAL PROTECTION CLAUSE.

A. The Court Of Appeals Erred In Holding That These Tax Classifications Could Be Sustained Only By A Compelling Government Interest.

This Court has consistently held that legislative classifications in the tax code normally will be sustained against equal protection challenge if such classifications bear a rational relationship to a legitimate governmental purpose. *E.g.*, *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 40-41 (1973); *United States v. Maryland Savings-Share Insurance Corp.*, 400 U.S. 4, 6

(1970); *Kahn v. Shevin*, 416 U.S. 351 (1974); *Lehnhausen v. Lake Shore Auto Parts Co.*, 410 U.S. 356 (1973); *Rogers v. County of Hennepin*, 240 U.S. 184, 192 (1916). The Court of Appeals suggested that Congress' failure to apply the same lobbying restrictions to § 501(c)(3) and veterans organizations was not only inexplicable, but probably even inadvertent, and thus could not pass muster even under the "rationality" test. This was a complete misreading of the legislative history.

Prior to 1934, there were no statutory limitations on the lobbying activities of any exempt organizations.[5] In the floor debate surrounding the enactment of the first such restrictions it was noted that:

> the attention of the Senate [Finance] committee was called to the fact that there are certain organizations which are receiving contributions in order to influence legislation and carry on propaganda. The committee thought there ought to be an amendment which would stop that . . .

78 Cong. Rec. 5959 (1934). A number of Senators felt the amendment should reach all deductible contributions, *id.* at 5861, but others were concerned lest the amendment be drawn too broadly to cover organizations not "acting from selfish motives" where there was less danger that the organization would simply "advance the personal interest of the giver of the money." *Id.* As a result, the lobbying restriction was enacted without change. Since the precise question of an extension of the restriction was considered and rejected, it can only be concluded that Congress acted intentionally not to apply the restrictions to all such organizations.

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[5] Revenue regulations took the position that the requirement that an exempt entity be organized and operated *exclusively* for exempt purposes totally precluded political activity. 2 Cum. Bull. 152, 154 (1920). However, in *Slee v. Comm'r*, 42 F.2d 184, 185 (2d Cir. 1930), the court left room for some "agitation" which "is ancillary to the end in chief." The 1934 amendment, discussed in text, has been regarded as codifying this formulation.

Congress has recently reexamined and adhered to this decision. In 1976, following several years of hearings, Congress enacted § 501(h) of the tax code, 26 U.S.C. § 501(h). Rather than adopting proposals to substantially eliminate the lobbying restrictions on § 501(c)(3) organizations, Congress decided to retain but liberalize the restrictions by permitting most § 501(c)(3) organizations to elect to expend up to specified percentages of their budget on lobbying.[6] During the same time frame, moreover, Congress created a specific statutory exemption for veterans organizations, § 501(c)(19), in order to exempt such organizations from "unrelated business income tax" on income received from bona fide members insurance programs. Congress specifically indicated, however, that such sheltered income could not be used for "lobbying." S. Rep. No. 1082, 92d Cong., 2d Sess. 5 (1972).

Congress has thus acted deliberately over nearly half a century to regulate the flow of tax-deductible dollars through exempt organizations for lobbying purposes, focusing particularly on § 501(c)(3) organizations where the danger for large-scale abuse seemed greatest, and imposing a variety of restrictions on other exempt organizations in response to particular needs and problems. Especially under traditional analysis, the Equal Protection Clause permits the Government to regulate "one step at a time," addressing itself to "the phase of the problem which seems acute." *Buckley v. Valeo*, 424 U.S. 1, 105 (1976), *quoting Williamson v. Lee Optical, Inc.*, 348 U.S. 483, 489 (1955). Even if the Government focuses upon "'one phase of one field and [applies] a remedy there,

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[6] *See generally Influencing Legislation By Public Charities, Hearing Before the House Ways and Means Comm.*, 94th Cong., 2d Sess. 61 (1976) [hereinafter cited as "Hearings 1976"]; *General Tax Reform, Hearings Before the House Ways and Means Comm.*, 93d Cong., 1st Sess. (1973) [hereinafter cited as "Hearings 1973"]; *Legislative Activity By Certain Types of Exempt Orgs., Hearings Before the House Ways and Means Comm.*, 92d Cong., 2d Sess. (1972) [hereinafter cited as "Hearings 1972"].

neglecting the others' . . . [s]o long as its judgments are rational, and not invidious, the legislature's efforts to tackle the problems . . . are not subject to a constitutional straitjacket." *Jefferson v. Hackney*, 406 U.S. 535, 546 (1972); *see also Clements v. Fashing*, 50 U.S.L.W. 4869 (U.S. June 25, 1982).

A majority of the Court below, while conceding that the unavailability of the benefits of § 501(c)(3) status to appellee does not impose a direct burden on appellee's First Amendment rights but only "involves unequal levels of governmental subsidy of First Amendment rights," App. 39a, nevertheless held that a strict level of scrutiny should be applied and that the distinctions drawn by § 501(c)(3) could be sustained only if they served a "substantial governmental interest [and were] . . . narrowly tailored to serve that end." *Id.* at 45a. That conclusion was plainly erroneous. This Court has on a number of occasions in recent years ruled that differing levels of governmental subsidy or benefits relating to the exercise of fundamental rights need not be subject to strict scrutiny under the Equal Protection Clause.

For example, in *Maher v. Roe*, 432 U.S. 464 (1977), the Court had to determine whether the withholding of government benefits from women who chose to exercise the fundamental right to a first trimester abortion warranted close judicial scrutiny. The Court concluded that it was "abundantly clear that . . . [the government] is not required to show a compelling interest for its policy choice to favor . . . [one permissible activity] any more than [it] must so justify its election to fund public but not private education. *Id.* at 478. *See also Harris v. McCrae*, 448 U.S. 297 (1980); *San Antonio Independent School District v. Rodriguez, supra*; *Cammarano v. United States*, 358 U.S. 498 (1959). As this Court held in considering an equal protection challenge to denial of public financing to some presidential candidates but not others, since the discrimination involved there was limited to "denial of the enhancement of opportunity to communicate with the electorate that the [statute] afford[s] eligi-

ble candidates," *Buckley v. Valeo*, 424 U.S. at 95, it was not required to be sustained by a compelling state interest. *A fortiori*, in this case, where the discrimination complained of is the Government's failure to provide an indirect subsidy by offering tax benefits to prospective donors, the standard of strict scrutiny must be rejected.[7]

B. Even Under A More Rigorous Standard Of Review, The Distinction Between Veterans Organizations And § 501(c)(3) Organizations Should Be Sustained.

Even if the Court of Appeals was correct in applying some degree of heightened scrutiny, the difference in treatment involved here is justified because (1) the lobbying restriction on § 501(c)(3) organizations reflects a strong governmental policy to guard against the wholesale use of deductible contributions for lobbying purposes, and (2) Congress legislated in a reasonably narrow and tailored manner, since the dangers Congress perceived in § 501(c)(3) organizations' lobbying are not posed to the same degree by veterans organizations.

The permissible purposes for which a § 501(c)(3) organization may be established are broad indeed, the number of such groups is large, and the reporting and disclosure requirements imposed on such organizations are minimal. Congress concluded that, in order to prevent such groups from functioning as mere conduits for the use of tax-deductible funds for lobbying to "advance the personal interests" of a few wealthy givers, lobbying restrictions were necessary. Both this Court and the lower federal courts have recognized Congress' "sharply defined national policy" to guard against the use of substantial

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[7] A very wide range of government programs provide subsidies or benefits, direct or indirect, that enhance the opportunities of one group as opposed to another in the exercise of important constitutional rights. If each of these governmental classifications must be justified under a "compelling interest" test, the courts would be faced with the detailed review of a staggering array of legislation. Nowhere is this more aptly illustrated than in the instant case; the tax code's treatment of exempt organizations alone reflects a complex pattern of historical legislative judgments.

tax-deductible funds for lobbying activities. *Cammarano v. United States, supra*, 358 U.S. at 508; *accord, Haswell v. United States*, 500 F.2d 1133, 1150 (Ct. Cl. 1974), *cert. denied*, 419 U.S. 1107 (1975) ("[C]ongressional interest in prevention of the use of tax funds to support lobbying is compelling").

The history of Congress' recent decision to mitigate the lobbying restrictions on § 501(c)(3) organizations demonstrates its particularized concerns about the dangers such organizations might pose to this important governmental policy absent such restrictions: that, due to their potentially flexible membership and loose internal regulations,[8] and the lack of functional reporting requirements imposed upon them,[9] these organizations were likely to become conduits for the advancement of the interests of wealthy contributors[10] and to front lobbyists

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[8] Hearings 1972, *supra* note 6, at 9 (remarks of Edwin Cohen, Ass't Sec'y for Tax Policy, Dept. of the Treasury; difficulty of defining membership of § 501(c)(3) organization); *id.* at 78-79 (remarks of Rep. Waggonner; looseness of membership criteria and lax internal review procedures of § 501(c)(3)s).

[9] *See* Hearings 1972, *supra* note 6, at 9 (remarks of Edwin Cohen; noting laxity of disclosure requirements on lobbying by § 501(c)(3)s); Hearings 1976, *supra* note 6, at 15 (remarks of Rep. Schneebeli and William M. Goldstein, Dep. Ass't Sec'y of the Treasury; need for disclosure requirements for § 501(c)(3)s); *id.* at 46 (statement of Mortimer M. Caplin, Esq.; § 501(h) would improve "monitoring the legislative efforts of public charities").

[10] Thus the ABA Section on Taxation stated in its recommendation to Congress that:

> Since the charitable deduction means more to the rich than the poor and the former have more money anyway to give away to charity, . . . permitting deductible charitable contributions to be used for lobbying purposes may extend the legislative influence of the rich as opposed to the poor. Finally, particular taxpayers may not want the tax exempt funds of a charity to be used to support particular legislation of which they disapprove.

Hearings, 1972, *supra* note 6, at 171; Hearings 1976 at 18 (Rep. Duncan: fear that § 501(h) "written for a few special groups").

whose statements "really represen[t] their own views rather than the people they profess to represent." [11]

That Congress did not perceive similar dangers in the operation of veterans organizations is hardly surprising, since such organizations are relatively fewer in number, were formed for specific and limited purposes, typically have well-defined membership and tight internal controls on lobbying activities, and, where federally chartered, are also subject to special annual audit requirements.[12] The nature and activities of the American Legion, the largest of all veterans organizations in membership, amply bear out this judgment. The Legion was formed by returning World War I veterans to promote the interests of veterans, particularly disabled veterans or others disadvantaged by their military service, and widows and orphans of those who had died in World War I. Its congressional charter, 36 U.S.C. §§ 41-51, specifically enumerates its organizational powers and purposes, and can be revised by Congress at any time. Thus, by contrast to most § 501(c)(3) organizations, the Legion has purposes that are specified and limited by Congress, and subject to its direct review.[13]

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[11] Hearings 1973, *supra* note 6, at 1496; *see* Hearings 1972, at 80-82 (remarks of Rep. Waggonner) (fear of representatives speaking without regard for "people back home"; involvement in "democratic process" through lobbying requires "democratic" representation of membership by § 501(c)(3)s).

[12] *Proposals for Administrative Changes in Internal Revenue Service Proceedings, Hearings before the Subcomm. on Oversight of the House Ways and Means Comm.*, 94th Cong., 1st Sess. (1975) [hereinafter "Hearings 1975"] at 133-34; (ABA report on effects of § 501(c)(3) status determination; veterans groups and other tax-exempt organizations distinguished from § 501(c)(3)s in that "contributions" to [the former] type of organization are typically made by a membership group which is likely to continue to support the organization even if a question is raised as to its [deductible] status").

[13] Moreover, Congress is in a particularly good position to scrutinize the sources of the Legion's funds and the uses to which they are put since, by law, the Legion must annually submit to Congress

Contrary to the suggestion in the Court of Appeals' opinion, App. 23a, the Legion does not pose the problems of an organization aggressively using tax-deductible money for lobbying. The Legion receives a negligible proportion of its budget from deductible contributions. Its principal source of funds is the payment of modest nondeductible annual dues by each of its 2,400,000 members. Other substantial sources of income include emblem sales income, advertising income from The American Legion Magazine, investment income, and income derived from its group term life insurance plan, the American Legion Life Insurance Plan.[14]

Similarly, only a small percentage of the Legion's funds —less than the ceiling imposed on a § 501(c)(3) organization under § 501(h)—are used for lobbying activities. In fact, of the Legion's 1982 budget approximating $23 million, only $314,284 is allocable to the legislative division, much of it for employee salaries and benefits—and a substantial part of the activities of this division involve responding to specific requests from congressional committees for testimony by Legion representatives. *Cf.* 26 U.S.C. § 501(h)(2)(A); 26 U.S.C. § 4911(d)(2)(B)

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a report of its proceedings for the preceding year, and an audit of accounts conducted by an independent accounting firm. 36 U.S.C. §§ 49, 1101-1103. And, of course, Congress is in a position to be knowledgeable concerning veterans' lobbying since it is primarily before Congress that such groups lobby.

[14] The Legion has a policy of not permitting the solicitation *or acceptance* of any contributions, including charitable contributions, without the specific consent of its National Executive Committee. Ordinarily, the Legion does not solicit contributions at the national level for its *own* purposes. It has, however, on a number of occasions conducted solicitations from among its members for tax-deductible contributions *to be given to others* for public or quasi-public purposes.

For example, the Legion has raised over $1.2 million in deductible contributions from its members for the Vietnam War Memorial on the Mall; $500,000 for the Bicentennial, which it gave the Government for production of a replica of the Freedom Bell; and in the past raised over $1 million for the Cancer Foundation.

("lobbying expenditures" do not include providing technical assistance in response to a request from a governmental body).

Congress' concern that organizational lobbyists would not in fact represent the views of large, but loosely organized memberships in the § 501(c)(3) context, is similarly inapplicable to veterans organizations. The American Legion will neither testify nor lobby unless its membership has, at an annual convention, formally adopted a specific resolution on the subject matter in question. This requirement is rigorously adhered to in order to assure that it is the views and interests of the Legion's members, and not simply those of a few leaders or contributors, that are communicated to the Congress.[15]

Finally, Congress was undoubtedly aware, as even the Court of Appeals recognized, that there are approximately *fifteen* times as many § 501(c)(3) organizations as veterans organizations and, more important, in 1978, contributions, gifts and grants to all § 501(c)(3) organizations totalled about $22 billion, nearly 1500 times the $16.7 million given to veterans organizations in that year. App. 73a. This substantial disparity, when viewed in combination with the special characteristics of veterans organizations, demonstrates convincingly why Congress saw no need to extend special lobbying restrictions to veterans groups.[16]

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[15] Membership approval is a significant factor because veterans are a large and substantial group, cutting across racial, political and geographic lines, lines of wealth and other criteria suspect under the First Amendment. Moreover, under its charter and national constitution, the Legion is absolutely prohibited from involvement in electoral politics.

[16] Both this Court and the Court of Appeals previously denied motions by the Legion to intervene as a party. If this Court were to conclude that a remand was necessary to explore veterans organizations' characteristics, amicus would, if permitted, make a proffer of proof in the District Court to establish the facts set forth above.

II. THE REMAND ORDERED BY THE COURT OF APPEALS PRESENTS SUBSTANTIAL STATUTORY AND CONSTITUTIONAL QUESTIONS.

This action was filed pursuant to § 7428 of the Internal Revenue Code, 26 U.S.C. § 7428. This special jurisdictional statute was enacted in 1976 to carve out a very narrow exception to the general rule, embodied in both the Anti-Injunction Act, 26 U.S.C. § 7421(a), and the Declaratory Judgment Act, 28 U.S.C. § 2201, that taxpayers can only challenge the Internal Revenue Service's treatment of them in a suit for refund in the District Court or Court of Claims, or in the Tax Court after the Commissioner has assessed a deficiency. The Court of Appeals' remand order here is inconsistent with Congress' purpose in that statute to impose narrow limitations on the federal courts' exercise of jurisdiction pursuant thereto, and thus raises an important issue for this Court's review.

Section 7428 is an unusual example of congressional qualification of federal court jurisdiction. A complaint may be filed "only by the organization the qualification or classification of which is at issue," and must relate to a "determination" by the Service relating to that organization's "initial . . . or continuing qualification" under § 501(c)(3). 26 U.S.C. § 7428(b)(1). Most important for these purposes, Congress set forth with great precision the nature of the "remedy" it was authorizing: "[U]pon the filing of an appropriate pleading, . . . the district court of the United States for the District of Columbia may make a declaration with respect to such initial qualification or continuing qualification. . . ." 26 U.S.C. § 7428(a)(2). The plain language of this statute thus indicates that Congress contemplated that, if a plaintiff prevailed in its challenge to the denial of an exemption, the court would simply issue a declaratory judgment that the Service had acted improperly.

The legislative history likewise supports the conclusion that the remedial jurisdiction of the district court under

§ 7428 is very limited. Congress sought to address a particular problem in this legislation—to wit, the inability of nonprofit organizations claiming to be entitled to § 501(c)(3) status to survive without deductible contributions in the event that such status was denied or revoked. Under the general limitations applicable to taxpayer litigation with the Service, the organization's only remedy was lengthy refund litigation in the Court of Claims or District Court, or a deficiency protest in the Tax Court. Such litigation left the organization's status as a recipient of deductible contributions in jeopardy, for contributions might simply dry up or the organization might never raise enough income to incur a tax liability permitting it to litigate the question. *See Alexander v. "Americans United" Inc.*, 416 U.S. 752 (1974); *Bob Jones University v. Simon*, 416 U.S. 725 (1974).

The expedited review procedure made available to § 501(c)(3) organizations in § 7428 constituted congressional recognition of these unique problems faced by such organizations. But Congress sought to limit the potential disruptiveness of such suits to the orderly administration of the tax code;[17] the intent of the law was simply to permit § 501(c)(3) organizations to obtain judicial review of their entitlement to exempt status in advance of incurring tax liability. So, with regard to remedies, the successful taxpayer in a § 7428 case—instead of obtaining a refund, or removing a deficiency notice—would obtain a declaratory judgment that it was entitled to exempt status.

The relief contemplated by the Court of Appeals here is far afield from that which Congress and the courts[18]

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[17] Thus, it specifically rejected proposals to permit district courts to issue injunctive relief, *see* Hearings 1975, *supra* note 12, at 126 (testimony of Alan Morrison) and adopted the ABA's recommendation that *only* § 501(c)(3), and *not* other § 501(c) organizations, be permitted to take advantage of this expedited procedure. Tax Section Recommendation No. 1974-17, *reprinted in* Hearings 1975 at 133-34.

[18] Until now, the federal courts have recognized congressional intent that § 7428 not interfere with the administration of the tax

have understood was intended under § 7428. Instead of making a determination as to whether the Service's denial of TWRW's application was correct, or should be set aside because the provision upon which it was based was unconstitutional, the Court below directed the District Court to consider issuing limitations on other taxpayers, contemplating a wholesale revision of the Service's administration of §§ 501(c)(4), 501(c)(19), and 170 insofar as they apply to veterans organizations. This is a tremendous distortion of the nature of the remedial process Congress contemplated in this statute.[19] *Cf.* S. Rep. No. 938, 94th Cong., 2d Sess., 588 (1976) (judgments under § 7428 "to be binding upon the parties to the case").

The remand order, moreover, poses problems going beyond the question of statutory interpretation. As the Government noted in its Jurisdictional Statement, the Court of Appeals seems to contemplate that the District Court should engage in precisely the kind of legislative hearing and policy determination reserved to Congress.

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code by any radical expansion of the procedures normally available to litigants against the Service, *see e.g., Southwest Virginia Professional Standards Review Org., Inc. v. United States*, 78-2 U.S.T.C. ¶ 9747 (D.D.C. 1978) (adopting Tax Court Rules limiting scope of *de novo* review); *Virginia Professional Standards Review Found. v. Blumenthal*, 466 F. Supp. 1164 (D.D.C. 1979) (conforming to Tax Court Rules regarding scope of review), and have also been rigorous in adhering to the substantive limitations on the subject matter of cases that may be brought under § 7428, *see, e.g., CREATE, Inc. v. Comm'r*, 634 F.2d 803 (5th Cir. 1981) (no jurisdiction under § 7428 to review adverse determination concerning applicability of percentage limitation to contributions to taxpayer). *See also* note 19, *infra*.

[19] The type of remedial order contemplated by Congress, in the event of a successful constitutional challenge to the denial of an exemption, is illustrated in *National Alliance v. United States*, 81-1 U.S.T.C. ¶ 9464 (D.D.C. 1981) (where regulation's definition of "educational" void for vagueness, IRS determination that plaintiff not entitled to tax exemption was vacated). *See also Basic Unit Ministry of Schurig v. Comm'r*, 670 F.2d 1210, 1211 (D.C. Cir. 1982) (explaining denial of unusual relief under § 7428).

(Juris. St. at 11.) Because the tax code is of such complexity, and the Court's decision has thrown into question the constitutionality of so many of its provisions acting in concert, the remand order does not pose a simple question of whether an equal protection violation arising from an underinclusive statute should be remedied either by extension or by invalidating the entire scheme. Instead, it contemplates a major and unprecedented restructuring of the tax code's treatment of exempt organizations. As this Court emphasized in *Califano v. Westcott*, 443 U.S. 76, 93 (1979), a proposed remedy which "would involve a restructuring of the Act" should not be undertaken lightly. *See also Welsh v. United States*, 398 U.S. 333, 366-67, n.18 (1970) (Harlan, J., conc'g). Recognizing that, in remedying equal protection violations a court "risks infringing legislative prerogatives," the Court in *Westcott* rejected the effort by the Massachusetts Commissioner of Welfare to obtain a remedial order that would have involved such a restructuring of the AFDC-UF program.[20] The Court specifically noted that the Commissioner's proposed restructuring "would pose definitional and policy questions best suited to legislative or administrative elaboration." 443 U.S. at 93.

As shown above in Part I, Congress made a deliberate decision to impose lobbying restrictions only on

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[20] The Court there found that a provision authorizing AFDC benefits where the father was unemployed, but not where the mother was unemployed, could not be sustained. The District Court's order, extending the operation of the statute to include unemployed mothers as well as unemployed fathers, was upheld by the Court, over the objections of four Justices who would have simply invalidated the entire program and left it to Congress to determine how it wished to proceed in view of the finding of unconstitutionality. The majority, however, rejected a suggestion by the State that the order should be modified to provide for payments only where the principal breadwinner (defined without regard to sex) had become unemployed. The Court, while noting that such a provision might be more consistent with the legislative purpose, rejected it on the grounds that it would have involved rewriting of the statute prohibited to the judiciary. *Westcott, supra*, 443 U.S. at 92-94.

§ 501(c)(3) organizations. As the hearings in the 1970's on § 501(h) made clear, Congress was aware that it was legislating in an area affecting First Amendment rights. *See, e.g.*, Hearings 1976, *supra* note 6, at 61. Particularly where such rights are at issue, a court should be loath to override legislative judgment, where the effect of its ruling would be to extend qualifications on otherwise protected activities rather than to remove them. *See United States v. Robel*, 389 U.S. 258, 277-78 (1967) (Brennan, J., conc'g).

This caution is reinforced by the very cases cited by the Court of Appeals in support of its remand order—none of which support its assertion that this Court has "recognized [that] in certain situations benefits may be taken way from a preferred group in order to cure unconstitutionally unequal treatment even if that group is not before the court." App. 75a.[21] Indeed, where stat-

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[21] In *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535 (1942), having found a denial of equal protection, the Court struck down the sterilization statute there at issue; it specifically declined to determine whether its unconstitutionality could be cured by extending the category of crimes for which sterilization would be inflicted. *Id.* at 543. Similarly, in *Welsh v. United States*, 398 U.S. 333 (1970), where the Court reversed the conviction of a conscientious objector on the ground that the statute, by requiring a religious belief, was unconstitutionally underinclusive, the Court's opinion nowhere suggests that an appropriate remedy might be to strike down the entire conscientious objector program. Justice Harlan, in a concurring opinion, alluded to the possibility that an underinclusive statute could be cured by invalidating altogether the benefit it provided, but concluded that the Court there did not have such a choice because a longstanding congressional policy would be undermined. *Id.* at 361, 366-67. *Iowa-Des Moines National Bank v. Bennett*, 284 U.S. 239 (1931), involved no unconstitutional statute, but an attack by two banks on the discriminatory administration of a state tax provision which resulted in lower taxes on the banks' competitors. The sentence relied on by the Court of Appeals from the opinion in that case, *see* App. 75a, when read in context, does not refer to any issue of remedy at all, but rather is a simple statement that petitioners there would not have had any

utes imposing restrictions on a particular group have been invalidated on grounds of under-inclusiveness, this Court has followed the practice of striking down the restrictions applied to the complaining party, rather than judicially extending them to a larger group. *See e.g., Skinner v. Oklahoma, supra*, 316 U.S. at 543; *Williams v. Rhodes*, 393 U.S. 23 (1968). Similarly, statutes providing governmental benefits found to discriminate by virtue of under-inclusiveness, have consistently been extended to cover those complaining that they were unfairly excluded. *See e.g., Califano v. Westcott*, 443 U.S. at 90-91 and cases cited therein. A number of reasons for this consistent practice can be identified. First, for a court to deprive a class of persons of a benefit Congress has already sought to confer (or, *a fortiori*, to impose on such persons a restriction on freedom that Congress has not sought to impose), particularly where they are not parties to the litigation, plainly implicates due process considerations not occasioned either by an extension of the benefit or a removal of the restriction.[22] Second, the courts have recognized the paramount need, in remedying equal protection violations, to do as little "rewriting" of legislation as possible. *Cf. Aptheker v. Secretary of State*, 378 U.S. 500, 515 (1964).[23]

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claim of discriminatory treatment in the first place if the tax burdens had been equalized, either by increase of their competitors' taxes or decrease of their own.

[22] As this Court has repeatedly made clear, the peculiar authority of courts arises from their jurisdiction over the particular parties whose rights and interests are being adjudicated. *See Hansberry v. Lee*, 311 U.S. 32, 40-41 (1940).

[23] In addition, for the courts to begin *extending* restrictive legislation complained of by members of the restricted class would undercut the predicate for standing—the existence of an injury redressable by the relief sought. *See Simon v. Eastern Ky. Welfare Rights Org.*, 426 U.S. 26 (1976). TWRW did not in this case complain that other organizations were allowed to lobby; it complained that it was not. To sustain the remedial order contemplated by the Court of Appeals would entirely divorce the constitutional prerequi-

As has been observed in a different context, "[f]ormulation of policy is a legislature's primary responsibility, entrusted to it by the electorate [and the Constitution] . . . Congress has the resources and the power to inform itself, and is the appropriate forum where the conflicting pros and cons should [be] presented and considered." *United States v. Robel*, 389 U.S. at 276 (Brennan, J., conc'g). *See also Califano v. Westcott*, 443 U.S. at 95-97 (Powell, J., conc'g and diss'g in part) (it is the duty and function of the legislature to review programs in which an unconstitutionality has been found and to make appropriate changes therein). Since there was substantial sentiment in the 94th Congress for elimination of lobbying restrictions on § 501(c)(3) organizations altogether, *see, e.g.*, Hearings 1976, *supra* note 6, at 57, and since Congress has consistently acted to recognize the special role of veterans organizations, it would surely be hazardous for a court to seek to predict what choices Congress would make if remedial legislation were necessary.

Given the complexity of the tax code, moreover, and the interaction of its numerous provisions to produce the alleged unconstitutional discrimination here, the remand order of the Court of Appeals virtually requires the District Court, in violation of the basic constitutional principle of separation of powers, to engage in legislative functions. Instead of affording the most simple and equitable remedy of a declaratory judgment in favor of TWRW's exemption application, the District Court would not only have to resolve whether to impose lobbying restrictions on veterans organizations, but would have to resolve difficult issues on how best to accomplish this, for no single provision in the tax code can simply be struck so as to achieve this result. It is difficult to imagine a set of choices more redolent of policy concerns com-

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site of standing to sue from any limits on the courts' remedial jurisdiction and thus pose further dangers of the courts invading the legislative prerogative.

mitted under the Constitution to the Congress.[24] And on these issues, as well, it would be difficult in advance of legislative hearings to predict Congress' choices.

What does seem clear, however, is that in this case, unlike those described above, there is a substantial reason to believe that, in enacting § 7428, Congress did *not* intend to permit the courts unfettered discretion to engage in wideranging, remedial restructuring of the tax code.

CONCLUSION

For all these reasons, probable jurisdiction should be noted.

Respectfully submitted,

* MITCHELL ROGOVIN
GEORGE T. FRAMPTON, JR.
VICKI C. JACKSON

ROGOVIN, HUGE & LENZNER
A Professional Corporation
1730 Rhode Island Avenue, N.W.
Suite 1100
Washington, D.C. 20036
(202) 466-6464

* Counsel of Record

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[24] Would, for example, the district court impose a "no substantial lobbying" requirement, modeled on that found in § 501(c)(3), on veterans organizations seeking to qualify as exempt organizations under §§ 501(c)(4) or (c)(19)? Would it instead insert such a requirement in the deductibility provisions, such as § 170? Would it make available a § 501(h) option for veterans organizations, and if so, would that be a condition of exempt status or of deductibility? Should veterans organizations' lobbying be specifically restricted in subject matter, instead of or in addition to quantitative proposals?

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In the

Supreme Court of the United States

OCTOBER TERM, 1981

DONALD T. REGAN, SECRETARY OF THE TREASURY, *et al.*,

Appellants,

v.

TAXATION WITH REPRESENTATION OF WASHINGTON,

Appellee.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF *AMICI CURIAE* OF DISABLED AMERICAN VETERANS AND PARALYZED VETERANS OF AMERICA IN SUPPORT OF JURISDICTIONAL STATEMENT OF THE UNITED STATES

JOSEPH C. ZENGERLE*
ZACHARY R. KAROL
BYRON R. TRAUGER

BINGHAM, DANA & GOULD
1724 Massachusetts Avenue, N.W.
Washington, D.C. 20036
(202) 822-9320

Counsel for Disabled American Veterans and Paralyzed Veterans of America

*Counsel of Record

BATEMAN & SLADE, INC.

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	i
INTERESTS OF *AMICI CURIAE*	1
SUMMARY OF ARGUMENT	3
ARGUMENT	3
I. The Court of Appeals lacked judicial power and denied *amici* due process when it authorized and urged the District Court to rewrite unchallenged statutes affecting nonparties	3
II. Congress's interest in curbing charities' potential for lobbying abuses and obtaining information from veterans' organizations fully justify its different tax treatment of the two types of organizations	9
CONCLUSION	17
APPENDIX A	1a
APPENDIX B	4a
APPENDIX C	7a
APPENDIX D	12a

TABLE OF AUTHORITIES

CASES:

Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975)	7
Buckley v. Valeo, 424 U.S. 1 (1976)	11
Craig v. Boren, 429 U.S. 190 (1976)	6n
Fry v. United States, 421 U.S. 542 (1975)	9n
Johnson v. Robison, 415 U.S. 361 (1974)	11

Page

Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307 (1976) 10

Moritz v. C.I.R., 469 F.2d 466 (10th Cir. 1972), *cert. denied*, 412 U.S. 906 (1973) 6n

Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950) 8

Northern Pipeline Construction Co. v. Marathon Pipeline Construction Co., 50 U.S.L.W. 4892 (U.S. June 29, 1982) (Nos. 81-150 and 81-546) 8

Orr v. Orr, 440 U.S. 268 (1979) 6n

Regan v. Taxation with Representation of Washington, 50 U.S.L.W. 3998 (U.S. June 22, 1982) (No. 81-2338) 3, 4n

Rental Development Corp. of America v. Lavery, 304 F.2d 839 (9th Cir. 1962) 7

Robinson v. Lorillard Corp., 444 F.2d 791 (4th Cir.), *cert. dismissed*, 404 U.S. 1006 (1971) 6, 7

Stanton v. Stanton, 421 U.S. 7 (1975) 6n

Taxation with Representation v. United States, 585 F.2d 1219 (4th Cir. 1978), *cert. denied*, 441 U.S. 905 (1979) 7n, 17

United States v. Carolene Products Co., 304 U.S. 144 (1938) 12n

Vaccarella v. Fusari, 365 F.Supp. 1164 (D. Conn. 1973) .. 6n

Vance v. Terrazas, 444 U.S. 252 (1980) 8

Webster Eisenlohr, Inc. v. Kalodner, 145 F.2d 316 (3d Cir. 1944), *cert. denied*, 325 U.S. 867 (1945) 6

Western & S. Life Ins. Co. v. Bd. of Equilization, 451 U.S. 648 (1981) 12n

Williams v. Rhodes, 393 U.S. 23 (1968) 12n

Page

Williams v. Zbaraz, 448 U.S. 358 (1980) 6, 9n

Women's Health Services, Inc. v. Maher, 482 F. Supp. 725 (D. Conn.), *vacated on other grounds*, 636 F.2d 23 (2d Cir. 1980) 6n

UNITED STATES CONSTITUTION:

Article III 3, 5

First Amendment 10, 11

Fifth Amendment 4

FEDERAL STATUTES:

28 U.S.C. § 1252 ..... 8n

36 U.S.C. §§ 90a *et seq.* 2

36 U.S.C. § 90c 14

36 U.S.C. § 90f 14n

36 U.S.C. §§ 1151 *et seq.* 2

36 U.S.C. 1153 14

36 U.S.C. 1156 ..... 14n

36 U.S.C. 1166 ..... 14n

38 U.S.C. § 3402 16

Hyde Amendment, Pub.L. 96-123, § 109, 93 Stat. 926 (1979) 6

Internal Revenue Code of 1954, as amended, 26 U.S.C.:

§ 170(c)(3) 2

§ 501(c)(3) 4, 5, 8, 12, 13

§ 501(c)(4) 2, 4, 5, 6, 8n

§ 501(c)(19) 4, 5, 6, 8n, 13n

Page

§ 4945 ..... 13n
§ 7852(a) 8n
Tax Reform Act of 1969, Pub. L. No. 91-172, 83 Stat. 496 (1970) 13n

RULES:

Federal Rule of Civil Procedure 54(c) 6, 7
Supreme Court Rules:
15.1(a) 4
34.1(a) 8, 9n

MISCELLANEOUS:

78 Cong. Rec. 5959 (1934) 12
IRS Publication No. 78, Cumulative List of Organizations Described in Section 170(c) of the Internal Revenue Code (1981) 2
H.R. Rep. No. 851, 92d Cong., 2d Sess. (1972) 13n
H.R. Rep. No. 1385, 73d Cong., 2d Sess. 17 (1934) 13
S. Rep. No. 558, 73d Cong., 2d Sess. 26 (1934) 12
S. Rep. No. 1082, 92d Cong., 2d Sess. (1972) 13n
Sixty-First National Report of the Disabled American Veterans, 1981, H.R. Doc. No. 104, 97th Cong., 1st Sess. 47 (1981) 14
War Veterans Organizations Regulations, 26 C.F.R. § 1.501(c)(19)-1(b) (1981) 14

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INTERESTS OF *AMICI CURIAE*

The Disabled American Veterans ("DAV") and the Paralyzed Veterans of America ("PVA") are nonprofit veterans' organizations qualified for income tax exemption as described

in Section 501(c)(4) of the Internal Revenue Code of 1954, as amended (26 U.S.C.), contributions to which are tax-deductible under Section 170(c)(3) of the Code. *See* IRS Publication No. 78, Cumulative List of Organizations Described in Section 170(c) of the Internal Revenue Code (1981).[1] Both DAV and PVA are chartered by Acts of Congress (36 U.S.C. §§ 90a *et seq.* and 1151 *et seq.*, respectively), and each has a program in which it attempts to influence legislation in furtherance of its statutory purposes. The great preponderance of the annual revenue of each organization is derived from tax-deductible contributions. In DAV's case, a substantial portion of this revenue is devoted to operating the largest national service program of any veterans' organization in the United States, assisting in this respect the more than 700,000 members of DAV (each of whom must possess a service-connected disability recognized under federal law), their families and other veterans through more than 2,500 chapters nationwide. In PVA's case, a substantial portion of its revenue is devoted to operation of a service program uniquely devoted to assisting the more than 11,000 members of PVA (each of whom must be a veteran who suffers from spinal-cord injury or disease) through approximately thirty-five chapters located throughout the states and territories.

Under the decision of the Court of Appeals in this case, *amici* might have to forego their right to receive tax-deductible contributions so essential to the important functions they

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[1] The Court of Appeals stated that Section 501(c)(4) organizations could not receive tax-deductible contributions. Jurisdictional Statement of the United States ("USJS"), Appendix ("App.") at 19a and 23a. The lower court's generalization is incorrect concerning veterans' organizations qualified for income tax exemption thereunder, as indicated by the authorities cited in text. Although the United States repeated the court's generalization about Section 501(c)(4), USJS at 4 n.3, it does not mean thereby to contend that the generalization covers veterans' organizations. *See, e.g.*, USJS at 22 n.14. Undersigned counsel has been assured by the Solicitor General that this is the case.

uniquely perform throughout the country for their special memberships and the nation's thirty million veterans as a whole, in order to continue to enjoy their unrestricted right to perform the additional function of promoting legislative programs of benefit to veterans. Having been denied leave to intervene in this case as appellants, *see* 50 U.S.L.W. 3998 (U.S. June 22, 1982), DAV and PVA now seek to express their views to this Court as *amici curiae*.

SUMMARY OF ARGUMENT

Amici present three arguments not before heard herein to support the noting of probable jurisdiction. First and second, the Court of Appeals' remedial decision both exceeded its power under Article III of the Constitution by redirecting the litigation over the parties' objections, and denied *amici* due process by jeopardizing their rights without affording them notice and an opportunity to be heard on the merits. Third, *amici* present important reasons for making applicable and confining the lobbying restriction at issue to charitable organizations, which reasons *amici* have not before been able to offer and which fully support the statutory classification thereby created.

ARGUMENT

I. The Court of Appeals Lacked Judicial Power and Denied *Amici* Due Process When It Authorized and Urged the District Court to Rewrite Unchallenged Statutes Affecting Nonparties.

The Court of Appeals committed three errors of constitutional dimension in deciding this case, not just one as suggested by the single question presented in the Jurisdictional Statement of the United States ("USJS") at I. *Amici* will thus first

address the two unexplored errors related to remedy because they are "fairly included" in the question presented by the USJS. Sup. Ct. Rule 15.1(a). *Amici* will then supplement the reasons offered by the United States in support of noting probable jurisdiction to review the holding of the Court of Appeals that the Internal Revenue Code's different treatment of lobbying by charitable and veterans' organizations violates the principle of equal protection found in the Fifth Amendment.

After ruling unconstitutional the lobbying restriction in Section 501(c)(3), the Court of Appeals decided that it was both possible and preferable to remedy that violation by extending the restriction to Sections 501(c)(4) and 501(c)(19) (which govern the tax exemption of veterans' organizations),[2] rather than removing the restriction from Section 501(c)(3) (which governs the tax exemption of charities like appellee). Appendix to USJS ("USJS App.") at 75a-78a. It therefore remanded the case to the District Court with the strong suggestion that extending rather than eliminating the restriction was the more appropriate remedy, despite the stated opposition of the prevailing party to this approach, USJS App. at 76a and n.53, and despite the fact that it would adversely affect veterans' organizations which had not theretofore participated in the litigation.[3]

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[2] To achieve this result, a lobbying restriction specifically limited to veterans' organizations would have to be judicially engrafted onto Section 501(c)(4). The lobbying freedom enjoyed by nonveterans' groups qualified under that provision is not implicated in this case because contributions to such groups are, unlike contributions to veterans' organizations, not tax-deductible. *See* note 1, *supra*. No such limitation would be required to engraft the lobbying restriction onto Section 501(c)(19) since that provision applies only to veterans' organizations.

[3] As recited in the affidavits of *amici* submitted to this Court in their unsuccessful effort to intervene herein after judgment as appellants, *see* 50 U.S.L.W. 3998 (U.S. June 22, 1982), and reproduced in the Appendix ("App.") hereto, neither DAV nor PVA was aware of the pendency of this litigation until after announcement of the Court of Appeals decision en banc. App. A and B, *infra*, at 3a and 5a-6a, respectively.

Amici submit that this remedial decision, *inter alia*, both violates the requirements of Article III of the Constitution, which limits the exercise of federal judicial power to "cases" and "controversies," and denies fundamental fairness to nonparties by exposing them to a judicially imposed burden without their ever having had notice or an opportunity to be heard on the merits of the case.[4]

Considering first the Article III infirmity, what plaintiff sought was a declaration that it was eligible for Section 501(c)(3) status despite its intention to engage in lobbying.[5] Plaintiff did not seek to have various lobbying restrictions engrafted onto Sections 501(c)(4) and 501(c)(19). *See* note 2, *supra*. It was the Court of Appeals which, by its mandate to the District Court, proposed and authorized the remedy of rewriting unchallenged statutes. Even if such a remedy would have been proper if plaintiff itself had sought and had standing to seek it, it is certainly not a proper remedy where the only "party" which favors it is the court itself.[6] The function of a court is to determine whether a party is entitled to the relief it seeks. It is not a court's function, *sua sponte*, to override the plaintiff's judgment of its own best interests and shift

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[4] The United States has already indicated that the Court of Appeals' "extraordinary disposition calls for review" because the appellate court's direction to the trial court "cannot be reconciled with the separation of powers among the three branches of government that is at the heart of our constitutional system." USJS at 11.

[5] For convenience, appellee's complaint is contained at App. C. Appellee's demand for relief appears at 10a-11a.

[6] In none of the five cases cited by the Court of Appeals in support of its remedial holding, nor in any case found by counsel, has a federal court refused to give the party whose equal protection challenge prevailed the benefit (or exclusion from burden) sought, in favor of extending to nonparties the burden (or exclusion from benefit) challenged. *See* USJS App. at 75a-76a; *Orr* v. *Orr*, 440 U.S. 268 (1979); *Craig* v. *Boren*, 429 U.S. 190 (1976); *Stanton* v. *Stanton*, 421 U.S. 7 (1975); *Moritz* v. *C.I.R.*, 469 F.2d 466 (10th Cir. 1972), *cert. denied*, 412 U.S. 906 (1973); *Women's Health Services, Inc.* v. *Maher*, 482 F. Supp. 725 (D. Conn.), *vacated on other grounds*, 636 F.2d 23 (2d Cir. 1980); *Vaccarella* v. *Fusari*, 365 F. Supp. 1164 (D. Conn. 1973).

the focus of the litigation to statutory provisions which the court believes the plaintiff should have attacked.

For example, in *Williams* v. *Zbaraz*, 448 U.S. 358 (1980), the plaintiff had challenged the constitutionality of a state statute concerning abortion funding, but the Court of Appeals there directed the District Court to rule on the constitutionality of a related federal statute (the Hyde Amendment). This Court held that the "constitutional validity of the Hyde Amendment was interjected as an issue only by the erroneous mandate of the Court of Appeals," and declared that there was no jurisdiction to deal with the validity of the federal statute because "the Court of Appeals could not create a case or controversy where none otherwise existed." *Id.* at 367. *Cf. Webster Eisenlohr, Inc.* v. *Kalodner*, 145 F.2d 316, 319-320 (3d Cir. 1944), *cert. denied*, 325 U.S. 867 (1945) (reversing trial court decision directing special master to inquire into matters not complained of by plaintiff, for being outside "judicial power [which] is limited to deciding controversies"). Similarly, the necessary but limited implication of Sections 501(c)(4) and 501(c)(19) for purposes of an equal protection analysis cannot expose those provisions, and those who benefit from them, to adverse treatment unless a party with standing to do so seeks such treatment.

Courts have expressed like concerns in construing the scope of Rule 54(c), Fed. R. Civ. P., which provides in part that "every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in his pleadings." Failure to demand any particular relief is thus no barrier to its award under the rule, but two principles are followed in limiting the extent to which the relief granted by federal courts can go beyond the demand. "The first is that a remedy desired by *none* of the parties should not be forced on them. [Citing cases.]" *Robinson* v. *Lorillard Corp.*, 444 F.2d 791, 803 (4th Cir.), *cert. dismissed*, 404 U.S. 1006 (1971) (emphasis in original). No party herein desired or, for all that appears, could hope to benefit by

the remedial option created by the Court of Appeals. *See* USJS at 11; USJS App. at 76a and n.53. Thus, that option was foreclosed from consideration either by the Court of Appeals or the District Court on remand, exceeding as it did the boundaries of judicial authority.

The second limiting principle raises the other unexplored constitutional defect in the Court of Appeals' remedial decision. The principle is that Rule 54(c) does not authorize the imposition of relief not sought if "the failure to ask for particular relief substantially prejudiced the opposing party." *Robinson*, 444 F.2d at 803 (citing *Rental Development Corp. of America* v. *Lavery*, 304 F.2d 839, 842 (9th Cir. 1962)). *See also Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 424 (1975) (relief not proper if the "other party" were "improperly and substantially prejudiced"). *A fortiori*, granting unrequested relief is precluded if the failure to request it substantially prejudices a nonparty.

The prejudice to *amici* created by the surprising decision of the Court of Appeals is manifest. Since *amici's* tax status was never the target of appellee's lawsuit, *amici* were never notified by any court or party that their right to enjoy lobbying freedom without governmental restriction or regulation was in jeopardy, *see* note 3 *supra*, and they were never given an opportunity to be heard on the merits.[7] Then, following its redirection of the litigation, the Court of Appeals thought it sufficient merely to "invit[e] veterans' organizations to participate in framing relief," USJS at 77a, and compounded its error by refusing to let *amici* intervene after judgment to appeal its decision. *See* App. D, *infra*, at 12a-13a. It thereby

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[7] Among the arguments *amici* might have made on the merits that are now foreclosed to them by virtue of the proceedings below is that appellee is precluded by res judicata from relitigating this case in light of the defeat of its predecessor organization on similar issues in *Taxation with Representation* v. *United States*, 585 F.2d 1219 (4th Cir. 1978), *cert. denied*, 441 U.S. 905 (1979) — an issue which the Court of Appeals noted the appellants did not choose to argue. USJS App. at 13a n.1.

denied *amici* that fundamental fairness required by the Constitution before such a valuable right may be taken. *Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950).

The requirements of due process and the absence of judicial power therefore constitutionally prevented the Court of Appeals from empowering the District Court to rewrite statutes not challenged and adversely affect nonparties thereby.[8] Its proper course, assuming plaintiff should have prevailed, was to declare the lobbying restriction in Section 501(c)(3) invalid and leave it to Congress to decide how, if at all, the statutory scheme should be amended. *Cf. Northern Pipeline Construction Co.* v. *Marathon Pipeline Construction Co.*, 50 U.S.L.W. 4892, 4902 (U.S. June 29, 1982) (Nos. 81-150 and 81-546) (judgment stayed to afford Congress an opportunity to amend statute held unconstitutional in part).

Briefs on the merits of an appeal in this Court may not raise questions not presented in the jurisdictional statement. Sup. Ct. R. 34.1(a). As indicated earlier, *supra* p. 4, *amici* believe that the important remedial issues raised by the Court of Appeals and requiring resolution if its decision on the merits is affirmed are "fairly included" in the question presented, and therefore may be briefed by the parties and considered by this Court should probable jurisdiction be noted.[9] *See, e.g., Vance* v. *Terrazas*, 444 U.S. 252, 258 n.5 (1980).

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[8] The Court of Appeals also ignored the relevant statutory barrier to its assertion of remedial power. The separability clause of the Internal Revenue Code provides: "If any provision of this title . . . is held invalid, the remainder of the title . . . shall not be affected thereby." 26 U.S.C. § 7852(a). Having found the lobbying restriction of Section 501(c)(3) to be invalid, the court was thus constrained from seeking to affect Sections 501(c)(4) and 501(c)(19), which appear elsewhere in Title 26. Thus, even if the lower court's ruling does not run directly afoul of the Constitution, the serious questions it raises in constitutional and other respects make its exercise of discretion in this regard clearly erroneous.

[9] That the remedial issue will be preserved for the Court's decision seems also clear by the scope of jurisdiction under 28 U.S.C. § 1252, which brings

Further, *amici* assume that the United States' objection to the Court of Appeals' remand order on grounds of separation of powers, *see* note 4 *supra*, reveals the Government's view that at least the question of the lower court's power, if not the due process issue as well, is fairly included in the question it presented. Therefore, *amici* expect that the Government will address that issue in its merits brief, if one is called for. However, out of an abundance of caution, because of the importance of the issues, and in order to insure a full presentation of the difficulties which the decision of the Court of Appeals portends, *amici* would suggest that if there is doubt about preservation or elaboration of the remedial issues at the merits stage, this Court could direct the parties to address the propriety of the lower court's extraordinary disposition of this case if and when it orders that probable jurisdiction be noted.

II. Congress's Interests in Curbing Charities' Potential for Lobbying Abuses and Obtaining Information from Veterans' Organizations Fully Justify Its Different Tax Treatment of the Two Types of Organizations.

In its Jurisdictional Statement, the United States argues that the Court of Appeals was wrong to apply heightened scrutiny to the statutory classification at issue, to limit its inquiry only to an examination of those purposes to be served by the classification which were actually expressed in the legislative record,

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before the Court "the whole case," *Williams* v. *Zbaraz*, *supra*, 448 U.S. at 367-368, and by the nature of the "plain error" committed by the Court of Appeals in this respect. Sup. Ct. R. 34.1(a). Moreover, because the lower courts' remedial decision could deny appellee the fruits of its victory, appellee may well raise the issue itself in a cross-appeal. But if neither appellants nor appellee is deemed to raise the remedial issue at the jurisdictional stage, and there is no other adequate authority to carry it into the merits stage, *amici* submit that their having presented the issue herein should suffice to preserve it. *Cf. Fry* v. *United States*, 421 U.S. 542, 545 n.5 (1975).

and to conclude that "absolutely no governmental interest whatsoever" (USJS App. at 66a) exists to support the statutory distinction.

Amici agree with the United States in all these respects, and provide below additional support for the Government's position. Of particular concern to *amici* is that they be given their first and perhaps only opportunity to be heard on a constitutional question directly affecting their interests and those of the nation's thirty million veterans. Their concern is underscored by the Court of Appeals' observation that, on the vital question of identifying governmental interests sufficient to justify the different tax treatment accorded to veterans' organizations, the "government made no attempt in the district court to present affidavits or other evidentiary materials." USJS App. at 49a.

Regarding the appropriate standard of review, the only possible justification for applying heightened scrutiny is the fact that lobbying activities involve the exercise of First Amendment rights. But that involvement alone is not enough to trigger more rigorous examination of a statutory classification. As this Court has held, "equal protection analysis requires strict scrutiny only when the classification *impermissibly* interferes with the exercise of a fundamental right." *Massachusetts Bd. of Retirement* v. *Murgia*, 427 U.S. 307, 312 (1976) (emphasis added, footnote omitted). Thus, the degree of impact determines the mode of review, and mere rationality is the test unless there has been an impermissible interference with the exercise of such rights. However, the Court of Appeals did not pursue a heightened scrutiny because the lobbying restriction at issue "impermissibly interferes" with appellee's First Amendment rights. Indeed, the Court of Appeals held that appellee "has not shown that Section 501(c)(3)'s lobbying restriction abridges its First Amendment rights." USJS App. at 35a. Instead, the lower court chose this course because Section 501(c)(3)'s "*indirect* burdens on First Amendment expression" do not fall "equally on all." USJS App. at 40a (emphasis added).

In this respect the Court of Appeals was "guided by *Buckley* v. *Valeo*, 424 U.S. 1 (1976)" (USJS App. at 41a), but inappropriately so. In *Buckley*, the speech rights of candidates subsidized through unequal federal campaign financing were at the core of the political process. Lobbying activities subsidized through allegedly unequal tax benefits are not similarly central to the functioning of charitable organizations. Moreover, unequal speech subsidies substantially affect the comparative strength of political candidates, who must compete directly with one another. Here there is no showing of any such direct competition between charities and veterans' organizations. Thus, the increased sensitivity to unequal speech subsidies in *Buckley* is not warranted here because the consequences of the alleged inequality are substantially less severe.

The lower court should have been guided instead by cases like *Johnson* v. *Robison*, 415 U.S. 361 (1974), which involved an equal protection claim by a conscientious objector who asserted that his exercise of First Amendment religious freedoms was penalized by his consequent ineligibility for veterans' benefits.

> [S]ince we hold . . . that the Act does not violate appellee's right of free exercise of religion, we have no occasion to apply to the challenged classification a standard of scrutiny stricter than the traditional rational-basis test.

Id. at 375 n.14. The principle enunciated in *Robison* controls here: where fundamental rights are not directly infringed, heightened scrutiny is simply not appropriate. Even if heightened scrutiny were appropriate, an examination of the important governmental interests served by the classification at issue convincingly demonstrates that Congress had ample justification for making it.[10] In 1934, Congress first amended the In-

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[10] As the Government pointed out, the lower court erred in restricting its examination of legislative purposes to those explicitly stated by the

ternal Revenue Code to include what is now the challenged lobbying restriction in Section 501(c)(3). In doing so, Congress's purpose was clear: to prevent abuses it detected in the lobbying activities of certain exempt organizations. The Senate Finance Committee Report of the amendment contained the following language:

> This change made by your committee prohibits the deduction for contributions made to *an* organization a substantial part of whose activities is participation in partisan politics or in carrying on propaganda, or otherwise attempting to influence legislation.

S. Rep. No. 558, 73d Cong. 2d Sess. 26 (1934) (emphasis added). However, Senator Harrison stated in subsequent floor debate:

> [T]here are *certain* organizations which are receiving contributions in order to influence legislation and carry on propaganda. The committee thought there ought to be an amendment to stop that, so that is why we have put this amendment in the bill.

78 Cong. Rec. 5959 (1934) (emphasis added). The change from "an" organization to "certain" organizations was carried forward into the Conference Committee report:

> This amendment prohibits any deduction for contributions made to *certain* organizations, a substantial part of

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legislature. USJS at 20 n.13. As this Court recently observed, a court may examine "all the considerations presented to [the legislature], *and those of which we may take judicial notice.*" *Western & S. Life Ins. Co.* v. *Bd. of Equalization*, 451 U.S. 648, 674 (1981) (quoting *United States* v. *Carolene Products Co.*, 304 U.S. 144, 154 (1938)) (emphasis added). Even in strict scrutiny cases courts may inquire beyond the legislative record. *See, e.g., Williams* v. *Rhodes*, 393 U.S. 23, 30 (1968) ("we must consider the facts and circumstances behind the law [and] the interests which the State claims to be protecting").

> the activities of which is participation in partisan politics or is carrying on propaganda, or otherwise attempting, to influence legislation . . . .

H.R. Rep. No. 1385, 73d Cong., 2d Sess. 17 (1934) (emphasis added).

It is thus evident that Congress intentionally narrowed its focus to those organizations within the universe of all tax-exempt organizations commonly referred to as charities and now described in Section 501(c)(3). This is not at all surprising. Today, charities outnumber veterans' organizations by more than ten to one and receive nearly 1,500 times more revenue. USJS App. at 73a. It is no wonder that the abusive potential of charities was a dominant legislative concern.[11]

Not only did Congress plainly intend to exclude veterans' organizations from the lobbying restriction it enacted in 1934, but it also has declined, during the succeeding forty-eight years, to extend the lobbying restriction to them. If the original absence of such a restriction on veterans' organizations were truly the result, the Court of Appeals suggests, of congressional "lack of attention and consistency" (USJS App. at 56a), then surely the oversight would not have survived nearly five decades.[12]

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[11] Congressional concern about the potential for lobbying abuse by specific types of tax-exempt organizations continues to the present. For example, in the Tax Reform Act of 1969, Pub. L. No. 91-172, 83 Stat. 496 (1970), Congress responded, *inter alia*, to what it perceived as the potential for lobbying and other similar abuses by one group of the "certain organizations," namely the private foundations, by forbidding them from engaging in any legislative or political activities. 26 U.S.C. § 4945.

[12] If Congress had wanted to extend the lobbying restriction to veterans' organizations, an opportune time to have done so would have been in 1972 when it enacted a new subsection of Section 501(c) that specifically applied to war veterans' organizations. *See* 26 U.S.C. § 501(c)(19). Examination of the legislative history of that amendment, however, indicates that the possibility of extending the lobbying provision was not even mentioned. *See* S. Rep. No. 1082, 92d Cong., 2d Sess. (1972); H.R. Rep. No. 851, 92d Cong., 2d Sess. (1972).

The continued refusal of Congress to extend the lobbying restriction to veterans' organizations is warranted by substantial reasons deriving from their uniqueness. First, veterans' organizations do not present the same potential for lobbying abuse as charities because they are subject to significantly more government regulation than charities. For example, the government determines who is eligible for membership in veterans' organizations. *See, e.g.*, War Veterans' Organizations Regulations, 26 C.F.R. § 1.501(c)(19)-1(b) (1981) (requiring, *e.g.*, that 75 percent of all members must be "war veterans"). Charities, of course, are subject to no such restriction. In *amici's* case, the only requirements for joining DAV and PVA are honorable military service and physical disability, resulting in a wide array of political and other beliefs in memberships otherwise sharing only those two qualifications.

Moreover, the activities of veterans' organizations like *amici* are circumscribed by their Congressional charters. *See, e.g.*, 36 U.S.C. §§ 90c (DAV) and 1153 (PVA) (setting forth the purposes of each organization). Again, charities are not subject to any comparable Congressional control. DAV is also careful to confine the permissible scope of its legislative activities by adopting at each annual convention a "Statement of Policy" which provides, in part, that the organization "will not take action on any resolution that proposes legislation designed to provide benefits for other than wartime, service-connected disability." *See, e.g.*, Sixty-First National Report of the Disabled American Veterans, 1981, H.R. Doc. No. 104, 97th Cong., 1st Sess. 47 (1981).[13]

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[13] Beyond these external and internal limitations on legislative activity, the Congressional charters of both DAV and PVA state that each organization is nonpolitical and may not promote the candidacy of any person seeking public office. 36 U.S.C. §§ 90f (DAV) and 1156 (PVA). Furthermore, DAV and PVA are required by statute to obtain annual audits for submission to the Congress, DAV's by the Comptroller General and PVA's by an independent auditor. 36 U.S.C. § 90c (DAV) and 1166 (PVA).

Both government and self-regulation have thus produced veterans' organizations like *amici* whose legislative activities are concentrated, by membership choice and charter restrictions, on issues principally if not exclusively involving veterans' benefits. As discussed below, it is precisely on such issues that Congress has a proper interest in obtaining the views of veterans' organizations. Congress therefore has no need to impose on veterans' organizations the broad prophylactic of the lobbying restriction it uses to govern charities' potential for lobbying abuse. This is so because Congress has already employed legislative means individually tailored to veterans' groups which accomplish essentially the same end.

Second, veterans' organizations warrant different lobbying treatment because Congress has a legitimate need for information which such groups are ideally situated to provide. The Government and the dissent in the Court of Appeals reviewed the constitutional legitimacy, repeatedly affirmed by this Court, of the special treatment Congress has traditionally afforded the nation's individual veterans. USJS at 19 n.12; USJS App. at 115a-116a. In order to ensure that these special veterans' programs are effective in terms of both substance and implementation, Congress regularly requires information on veterans' needs and how they are being met. Veterans' organizations are uniquely able to supply that information.[14]

DAV and PVA engage in a continuous process of consultation with their members through their more than 2,500 local chapters and through annual conventions at which agenda for the following years are established. It is therefore evident why Congress might consider it vital to solicit the views of

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[14] Of course, this is not to suggest, as the Court of Appeals apparently thought it was, that veterans' organizations are entitled to more freedom of speech than other groups. USJS at 46a-47a. Rather, it is only to observe that since Congress may legitimately provide special assistance to veterans, Congress may also legitimately determine that it wants to obtain the opinions of veterans' organizations to assist it in deciding how and in what form those benefits may most effectively be distributed.

these organizations before determining how funds appropriated for the benefit of their members should be spent. For example, DAV represents more than 700,000 disabled veterans from every American war since the Spanish-American; more than twenty-five percent are Vietnam-era veterans. PVA, with over 11,000 members, represents more than half of all American veterans who suffer from spinal-cord injury or disease.

DAV and PVA are also direct providers of services to veterans and thereby gain special insight into both the importance and effectiveness of these services and the federal programs to which they are in part related. DAV operates thé most extensive National Service Program of all the major veterans' organizations in the United States. The program is staffed by 278 National Service Officers ("NSO's") employed by DAV in sixty-eight cities across the nation. Each NSO is accredited by the Veteran's Administration under 38 U.S.C. § 3402. NSO's provide counselling for veterans and their families concerning the full panoply of government benefits to which the veterans' status and disabilities entitle them. The NSO's, all of whom are extensively trained by DAV, also act as attorneys in fact for veterans who wish them to do so. As such, during the year ending June 30, 1981, DAV Officers helped veterans and their families to secure from the federal government almost one billion dollars in retroactive annual and new monthly benefits.

Beyond these counselling and advocacy functions of its service program, DAV itself provides financial benefits. It maintains an Emergency Relief Fund to assist veterans facing financial emergencies, and a Disaster Fund to aid veterans who have suffered from natural calamities. During the year ending June 30, 1981, DAV dispensed more than $1.3 million to nearly 7,000 veterans and families from these funds. In addition, DAV awarded more than $300,000 in scholarship money to 189 students for the 1980-81 school year.

PVA operates a similar service program that employs fifty full-time service officers in forty-four offices across the United

States. These service officers are recognized nationwide as experts in the complex and little-understood field of catastrophic and multiple disabilities. PVA's service programs account for more than sixty percent of its annual budget and are half again as large as they were only four years ago. In addition, PVA is the largest nongovernmental supporter of spinal-cord injury research. Last year alone, PVA provided approximately $500,000 to this effort. It also operates a nursing scholarship program to provide education to those who help care for catastrophically disabled veterans and seek to return them to society as productive members.

Since Congress and veterans' organizations such as *amici* are committed to so many of the same goals with regard to the nation's veterans, it would be at best illogical for Congress to restrict the opportunity of these organizations to provide it with information important in furthering their common effort. As the Court of Appeals for the Fourth Circuit held in coming to the opposite conclusion of the court below:

> the unique and compelling societal and governmental goals served by [veterans'] organizations provide ample justification for the special tax treatment extended to them by the Congress.

Taxation With Representation v. *United States*, 585 F.2d 1219, 1225 (4th Cir. 1978), *cert. denied*, 441 U.S. 905 (1979).

CONCLUSION

Probable jurisdiction should be noted, to correct apparent error, to review a decision of significant national impact, and

to afford representatives of the country's thirty million veterans their only opportunity to be heard on matters of vital interest to them.

Respectfully submitted,

JOSEPH C. ZENGERLE*
ZACHARY R. KAROL
BYRON R. TRAUGER

BINGHAM, DANA & GOULD
1724 Massachusetts Avenue, N.W.
Washington, D.C. 20036
(202) 822-9320

Counsel for Disabled American Veterans and Paralyzed Veterans of America

*Counsel of Record

Appendix A.

United States Court of Appeals for the District of Columbia Circuit

No. 79-1464

TAXATION WITH REPRESENTATION OF WASHINGTON,

APPELLANT,

v.

DONALD T. REGAN, SECRETARY OF THE TREASURY, ET AL.,

APPELLEES.

AFFIDAVIT OF NORMAN B. HARTNETT

I, Norman B. Hartnett, being duly sworn, depose and say as follows:

1. I am the National Director of Services for the Disabled American Veterans ("DAV"). In that capacity, I submit this affidavit in support of the Motion of the Disabled American Veterans to Intervene in the case of *Taxation with Representation of Washington v. Regan*, No. 79-1464 (D.C. Cir. Mar. 26, 1982) (en banc).

2. In my capacity as National Director of Services for the DAV, I am responsible for the operation of DAV's Washing-

ton, D.C. office. I supervise all of DAV's legislative activities, and I am in charge of the National Service Program. During the course of my work, I regularly become aware of governmental actions and litigation that might affect the operation of DAV.

3. DAV was formed in 1920 by a group of disabled World War I veterans. It was chartered by an Act of Congress on June 17, 1932, and was incorporated in Ohio in 1938.

4. DAV is exempt from federal income taxation under Section 501(c)(4) of the Internal Revenue Code of 1954, as amended, and the deductibility of contributions to it are governed by Section 170 of the Internal Revenue Code. I am attaching as Exhibit A to this affidavit a true copy of a letter, dated June 24, 1942, from the Deputy Commissioner of Internal Revenue to DAV, a copy of which letter is maintained under my custody and control in DAV's files in Washington, D.C., and which determines DAV's tax exemption and tax deductibility. When Section 501(c)(19) was enacted in 1972, DAV did not elect to become qualified thereunder because DAV had no insurance program for its membership from which it derived income.

5. To qualify for membership in DAV, an individual must be an honorably discharged veteran of the United States Armed Forces with a disability incurred in wartime military service or under conditions simulating war. At present, there are a total of approximately 710,000 members of DAV.

6. Among the programs of DAV are a National Legislative Program. Through its National Legislative Program, DAV seeks in a non-partisan way to secure benefits for its membership and for other veterans.

7. The total revenue of DAV for the year ended December 31, 1981, is approximately $31 million. Approximately $25 million of that total is derived from contributions through direct solicitations to the general public.

8. On March 26, 1982, I first learned of the existence of the litigation known as *Taxation With Representation of Washington v. Regan*, No. 79-1464 (D.C. Cir. Mar. 26, 1982) (en banc), the litigation in which DAV seeks to intervene.

9. To the best of my knowledge, no one else in DAV knew about the pendency of the *Taxation v. Regan* lawsuit before I learned about the decision.

/s/_____
NORMAN B. HARTNETT

Sworn to and subscribed before me this 20th day of April, 1982.

/s/_____
NOTARY PUBLIC

My Commission Expires:
October 14, 1986

Appendix B.

United States Court of Appeals for the District of Columbia Circuit

No. 79-1464

TAXATION WITH REPRESENTATION OF WASHINGTON,

APPELLANT,

v.

DONALD T. REGAN, SECRETARY OF THE TREASURY, ET AL.,

APPELLEES.

AFFIDAVIT OF R. JACK POWELL

I, R. Jack Powell, being duly sworn, depose and say as follows:

1. I am Executive Director of the Paralyzed Veterans of America ("PVA"). In that capacity, I submit this affidavit in support of the motion of the PVA, *et al.*, to intervene in the case of *Taxation With Representation of Washington* v. *Regan*, No. 79-1464 (D.C. Cir. Mar. 26, 1982) (en banc).

2. In my capacity as Executive Director of PVA, I am its chief salaried officer. I am responsible for the day-to-day operation of the organization and I supervise the activities of

PVA's Legislative Department. During the course of my work, I regularly become aware of governmental actions and litigation that might affect the operation of PVA.

3. PVA was formed in 1946 by several groups of paralyzed veterans which convened in Chicago, Illinois. It was chartered by an Act of Congress on August 11, 1971.

4. PVA is exempt from federal income taxation under Section 501(c)(4) of the Internal Revenue Code of 1954, as amended, and the deductibility of contributions to it are governed by Section 170 of the Internal Revenue Code. I am attaching as Exhibit A to this affidavit a true copy of a letter, dated February 2, 1973, from the Internal Revenue Service to PVA, a copy of which letter is maintained under my custody and control in the PVA files in Bethesda, Maryland, and which determines PVA's tax exemption and tax deductibility.

5. To qualify for membership in PVA, an individual must be a veteran of the United States Armed Forces who has suffered spinal-cord injury or disease. At present, there are a total of approximately 12,000 members of PVA.

6. Through its National Legislative Department, PVA seeks to influence legislation to ensure and improve benefits to spinal-cord injured or diseased veterans and others similarly afflicted.

7. The total revenue of PVA for the fifteen months ending December 30, 1981, was approximately $11.5 million. Approximately $10.4 million of that total was derived from public contributions.

8. On March 26, 1982, I first learned of the existence of the litigation known as *Taxation With Representation of Washington v. Regan*, No. 79-1464 (D.C. Cir. Mar. 26, 1982) (en banc), the litigation in which the Veterans' Organizations seek to intervene.

9. To the best of my knowledge, no one else in PVA knew about the pendency of the *Taxation v. Regan* lawsuit before I learned about the decision.

/s/_____
R. JACK POWELL

Sworn to and subscribed before me this 23rd day of April, 1982.

/s/_____
NOTARY PUBLIC

My Commission Expires:
October 14, 1986

Appendix C.

United States District Court for the District of Columbia

TAXATION WITH REPRESENTATION OF WASHINGTON
2369 North Taylor Street
Arlington, Virginia 22207
(703) 527-2605

Plaintiff, CIVIL ACTION NO. 78-0834

v.

W. MICHAEL BLUMENTHAL,
Secretary of the Treasury,
JEROME KURTZ,
Commissioner of Internal Revenue,
and
THE UNITED STATES OF AMERICA,

Defendants.

May 10, 1978

COMPLAINT FOR DECLARATORY RELIEF

1. This is an action for declaratory judgment with respect to the initial tax exempt qualification of an organization described in section 501(c)(3) of the Internal Revenue Code ("the Code").

2. This Court has jurisdiction under 26 U.S.C. § 7428.

3. Plaintiff Taxation with Representation of Washington ("TWRW") is incorporated under the District of Columbia Non-Profit Corporation Act. Its principal office is located in Arlington, Virginia.

4. The defendants are W. Michael Blumenthal, Secretary of the Treasury, Jerome Kurtz, Commissioner of Internal Revenue, and the United States of America.

5. TWRW was formed on June 14, 1977, to absorb and carry forward the courtroom and legislative advocacy activities conducted by two other nonprofit organizations, Tax Analysts and Advocates ("TAA") and Taxation with Representation ("TWR").

6. TAA is classified by the Internal Revenue Service as a tax exempt charitable and educational group under section 501(c)(3) of the Code. It engages in public interest tax-related litigation and publishes a weekly journal on federal tax matters. TWR is classified by the Internal Revenue Service as a tax exempt social welfare organization under section 501(c)(4) of the Code. It is principally engaged in representing the interests of ordinary taxpayers at legislative and administrative hearings.

7. Both TAA and TWR are financed through public contributions. In addition, TAA (but not TWR) is partly supported by publication receipts and foundation grants.

8. Under current law, contributions to TAA for its courtroom advocacy work are tax deductible, but contributions to TWR for its legislative advocacy are not. In addition, foundations may support the courtroom advocacy of TAA, but may not, without penalty, support the legislative advocacy of TWR.

9. The Internal Revenue Service ("IRS"), an agency of defendant United States of America, has ruled that TWRW does not qualify for exempt status under section 501(c)(3) of the Code. The IRS has rejected TWRW's request for exempt status under section 501(c)(3) of the Code solely because of TWRW's stated purpose of attempting to influence legislation.

10. On June 27, 1977, TWRW filed with the IRS a completed application for recognition of exemption under section

501(c)(3) of the Code. On October 6, 1977, the IRS requested additional information to complete its consideration of the application. This information was timely furnished to the IRS on November 1, 1977. The IRS denied recognition of exemption under section 501(c)(3) of the Code on November 25, 1977.

11. On December 13, 1977, TWRW filed a timely protest of the IRS denial and requested a conference on the exemption application with the IRS. On January 10, 1978, a conference was held between Thomas F. Field of TWRW and Edward K. Karcher of the Exempt Organizations Division of the IRS.

12. On February 14, 1978, the IRS issued a final adverse ruling denying TWRW exempt status under section 501(c)(3) of the Code.

13. TWRW has exhausted its administrative remedies.

14. If TWRW were exempt from federal income taxation under section 501(c)(3) of the Code, it would be eligible to receive contributions which would be tax-deductible to donors under sections 170(c)(2), 2055(a)(2), 2106(a)(2) and 2522 of the Code. Based on the experience of TAA and TWR, this means that individual contributions would be approximately 23 percent greater than otherwise. In addition, private foundations would be entitled to provide funds for the general support of TWRW's activities without incurring tax liability under Code section 4945(d)(5) as a result of their contributions. In practice, foundations will not make grants to TWRW if there is any possibility of incurring section 4945 tax penalties. TWRW's efforts to raise funds to support its activities are thus severely hampered by the IRS denial of section 501(c)(3) status.

15. TWRW would qualify for section 501(c)(3) status except for its stated purpose of attempting to influence legislation.

16. The denial of section 501(c)(3) status to TWRW on the ground that it may engage in substantial attempts to influence legislation is unconstitutional in the following respects:

(a) the restrictions on substantial attempts to influence legislation unconstitutionally abridge the freedoms of speech, association, and press, and the right of petition of TWRW and its members by conditioning the benefits of eligibility under section 501(c)(3) upon the surrender of such First Amendment rights and freedoms;

(b) the restrictions on substantial attempts to influence legislation deny TWRW and its members the equal protection of the laws, as guaranteed by the due process clause of the Fifth Amendment, since organizations which are similarly situated in relevant respects are, without regard to whatever attempts they make to influence legislation, granted tax benefits while comparable benefits are denied to TWRW;

(c) the restrictions on substantial attempts to influence legislation contained in section 501(c)(3) are unconstitutional on the ground of vagueness since they lack the specificity required where a statute touches upon the exercise of First Amendment freedoms.

WHEREFORE, plaintiff prays that the Court declare (1) that defendants' denial of exempt status to plaintiff is improper since the denial is based on a statutory restriction which is unconstitutional, (2) declare that plaintiff is entitled to exempt

status under section 501(c)(3) of the Code, and (3) grant such other relief as the Court may deem just and proper.

Respectfully submitted,

/s/_____

John Cary Sims
Suite 700
2000 P Street, N.W.
Washington, D.C. 20036
(202) 785-3704

Edward M. Quinn
Thomas F. Field
2369 North Taylor Street
Arlington, Virginia 22207
(703) 522-1800

Attorneys for Plaintiff

May 10, 1978

Appendix D.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 79-1464 **September Term, 1981**

TAXATION WITH REPRESENTATION OF WASHINGTON,
APPELLANT
v.
DONALD T. REGAN,
Secretary of Treasury, et al.

CIVIL ACTION NO. 78-0834

Received
United States Court
of Appeals for the
District of Columbia Circuit
May 27, 1982
GEORGE A. FISHER
CLERK

BEFORE: Robinson, Chief Judge; Wright, Tamm, MacKinnon, Robb, Wilkey, Wald, Mikva, Edwards and Ginsburg, Circuit Judges

ORDER

Upon consideration of the motion of Disabled American Veterans and Paralyzed Veterans of America for leave to intervene, the motion of American Legion to intervene and for expeditious determination of this motion, the motion and corrected motion of Veterans of Foreign Wars of the United States for leave to intervene, appellees' (federal) opposition to motions for intervention, and the replies of Disabled American Veterans and Paralyzed Veterans of America and American Legion to the aforesaid opposition, it is

ORDERED, by the Court, that the aforesaid motions to intervene are denied and the Clerk is directed to note the docket accordingly.

Per Curiam

FOR THE COURT:

/s/_____
GEORGE A. FISHER
Clerk

Office - Supreme Court, U.S.
FILED
JUL 22 1982
ALEXANDER L. STEVAS,
CLERK

No. 81-2338

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

DONALD T. REGAN, SECRETARY OF THE TREASURY, *et al.*,
Appellants,

v.

TAXATION WITH REPRESENTATION OF WASHINGTON,
Appellee.

On Appeal from the United States Court of Appeals for the District of Columbia Circuit

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AMICUS CURIAE BRIEF OF THE VETERANS OF FOREIGN WARS OF THE UNITED STATES IN SUPPORT OF APPELLANT'S JURISDICTIONAL STATEMENT

Of Counsel:
GEORGE H. GANGWERE
LAWRENCE M. MAHER
SWANSON, MIDGLEY, GANGWERE, CLARKE & KITCHIN
1500 Commerce Bank Building
Kansas City, Missouri 64106

WILMER S. SCHANTZ, JR.
6736 Old McLean Village Drive
McLean, Virginia 22101

SHELDON S. COHEN
Counsel of Record
JULIE NOEL GILBERT
DENNIS B. DRAPKIN
LINDA F. WORRELL
COHEN AND URETZ
Suite 400
1775 K Street, N.W.
Washington, D.C. 20006
Telephone: (202) 835-7300
Counsel for the Veterans of Foreign Wars of the United States

July 22, 1982

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTIONS PRESENTED

1. Whether the action should be dismissed on grounds of *res judicata* or because the district court lacked jurisdiction over the constitutional issues.

2. Whether appellee's rights to equal protection of the law have been violated by a statutory limitation on its ability to lobby with tax-deductible contributions that does not apply to veterans' organizations.

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iv
INTEREST OF THE VETERANS OF FOREIGN WARS OF THE UNITED STATES	1
SUMMARY OF THE ARGUMENT	2
ARGUMENT	3
I. THE COURT SHOULD DISMISS THE CASE ON GROUNDS OF *RES JUDICATA* OR BECAUSE THE COURT LACKS JURISDICTION TO ADJUDICATE THE CONSTITUTIONAL QUESTIONS AT ISSUE	3
A. The Court should consider, *sua sponte*, the problem of *res judicata* that arises from the history of appellee's litigating activities	3
B. The Court lacks jurisdiction to adjudicate constitutional issues in a case brought under Section 7428	6
II. THERE IS SUFFICIENT EVIDENCE IN THE RECORD TO ALLOW THE COURT TO REVERSE THE COURT OF APPEALS ON PLENARY REVIEW	9
III. IF THE COURT IS NOT PREPARED TO DISMISS OR TO REVERSE, THEN THE PROCEEDING SHOULD BE RECOMMENCED *AB INITIO*	13
A. Veterans' groups should participate in developing the record in this case	13
1. The record below regarding the VFW is replete with error	13
2. Veterans' organizations could provide further information in support of their special tax code treatment	15
B. The issues involved in fashioning a remedy in this case were not adequately considered by the court of appeals	17
CONCLUSION	20

TABLE OF AUTHORITIES

Cases:	Page
Alexander v. "Americans United", Inc., 416 U.S. 752 (1974)	6
Bob Jones University v. Simon, 416 U.S. 725 (1974)	6
California v. Grace Brethren Church, 50 U.S.L.W. 4703 (U.S. June 15, 1982)	9
Church in Boston v. Commissioner, 71 T.C. 102 (1978)	8
Houston Lawyer Referral Service, Inc. v. Commissioner, 69 T.C. 570 (1978)	7, 8
Johnson v. Robison, 415 U.S. 361 (1974)	9
Madden v. Kentucky, 309 U.S. 83 (1940)	10
Performance Plus Fund, Ltd. v. Winfield & Co., 443 F. Supp. 1188 (N.D. Cal. 1977)	4
Pick Mfg. Co. v. General Motors Corp., 80 F.2d 639 (7th Cir. 1935)	4
San Antonio Independent School District v. Rodriguez, 411 U.S. 1 (1973)	10
Southwest Virginia Professional Standards Review Organization, Inc. v. United States, 78-2 U.S. Tax Cas. (CCH) ¶ 9747 (D.D.C. 1978)	8
Tax Analysts and Advocates v. Shultz, 376 F. Supp. 889 (D.D.C. 1974), *appeal dismissed mem. sub nom. Tax Analysts and Advocates v. Simon*, 512 F.2d 922 (D.C. Cir. 1975)	4
Taxation With Representation v. United States, 76-2 U.S. Tax Cas. (CCH) ¶ 9693 (E.D. Va. 1976), *aff'd*, 585 F.2d 1219 (4th Cir. 1978), *cert. denied*, 441 U.S. 905 (1979)	4, 12
Thompson v. Commissioner, 71 T.C. 32 (1978)	8
Virginia Professional Standards Review Foundation v. Blumenthal, 466 F. Supp. 1164 (D.D.C. 1979)	8
Weinberger v. Salfi, 422 U.S. 749 (1975)	9
United States Constitution:	
U.S. Const. Amend. I	4
U.S. Const. Amend. V	4

TABLE OF AUTHORITIES—Continued

Statutes and Regulations:	Page
Act of Aug. 29, 1972, Pub. L. No. 92-418 § 2, 86 Stat. 656	12
Act of June 25, 1948, Judiciary and Judicial Procedure, 28 U.S.C. § 1251, *et seq.* (1976 and Supp. IV 1980):	
28 U.S.C. § 1252	9
28 U.S.C. § 1341	9
28 U.S.C. § 1346(e)	6
28 U.S.C. § 2201	6
Act of May 28, 1936, 36 U.S.C. § 111, *et seq.* (1976 and Supp. IV 1980)	1
36 U.S.C. § 113	14
Internal Revenue Code of 1954, 26 U.S.C. § 1, *et seq.* (1976 and Supp. IV 1980)	2
26 U.S.C. § 170	17, 18, 19, 20
26 U.S.C. § 170(c)(2)	17
26 U.S.C. § 170(c)(3)	18
26 U.S.C. § 170(c)(4)	18, 19
26 U.S.C. § 501	14, 17, 19, 20
26 U.S.C. § 501(c)	14
26 U.S.C. § 501(c)(3)	*passim*
26 U.S.C. § 501(c)(4)	17
26 U.S.C. § 501(c)(7)	17
26 U.S.C. § 501(c)(8)	18
26 U.S.C. § 501(c)(10)	18
26 U.S.C. § 501(c)(19)	12, 17
26 U.S.C. § 501(h)	*passim*
26 U.S.C. § 512(a)(4)	12
26 U.S.C. § 2055(a)(3)	19
26 U.S.C. § 4911	11
26 U.S.C. § 4911(d)(2)(B)	16
26 U.S.C. § 7421	6, 7
26 U.S.C. § 7428	2, 6, 7, 8, 9
26 U.S.C. § 7428(b)(2)	7
26 U.S.C. § 7476	8

TABLE OF AUTHORITIES—Continued

	Page
Revenue Act of 1934, Pub. L. No. 215, 48 Stat. 680:	
Section 23(o)(2)	10
Tax Reform Act of 1976, Pub. L. No. 94-455, 90 Stat. 1720 (1976)	11
26 C.F.R. § 1.0, *et seq.* (1982)	2
26 C.F.R. § 1.170A-1(h)(5)	18, 19
26 C.F.R. § 1.501(c)(19)-1(a)(1)	14
26 C.F.R. § 1.501(c)(19)-1(c)	14
Congressional Documents:	
H.R. 4994, 93d Cong., 1st Sess. (1973)	11
H.R. 5095, 93d Cong., 1st Sess. (1973)	11
H.R. 8021, 94th Cong., 1st Sess. (1975)	11
H.R. 13500, 94th Cong., 2d Sess. (1976)	11
H.R. 13720, 92d Cong., 2d Sess. (1972)	11
H.R. 14443, 93d Cong., 2d Sess. (1974)	11
S. 1408, 92d Cong., 1st Sess. (1971)	11
S. 2832, 94th Cong., 1st Sess. (1975)	11
S. 3063, 92d Cong., 2d Sess. (1972)	11
General Tax Reform: Hearings on the Subject of General Tax Reform Before the House Comm. on Ways and Means, 93d Cong., 1st Sess. (1973)	11
Influencing Legislation By Public Charities: Hearings on H.R. 13500 Before the House Comm. on Ways and Means, 94th Cong., 2d Sess. (1976)	11
Legislative Activity by Certain Types of Exempt Organizations: Hearings Before the House Comm. on Ways and Means, 92d Cong., 2d Sess. (1972)	11
Panama Canal Treaties: Hearings Before the Senate Comm. on Foreign Relations, 95th Cong., 1st Sess. (1977)	14
Tax Reform Act of 1969: Hearings on H.R. 13270 Before the Senate Comm. on Finance, 91st Cong., 1st Sess. (1969)	11

TABLE OF AUTHORITIES—Continued

Page

Tax Reform, 1969: Hearings on the Subject of Tax Reform Before the House Comm. on Ways and Means, 91st Cong., 1st Sess. (1969) 11
Proc. of the 78th Nat. Convention of the Veterans of Foreign Wars of the United States, H.R. Doc. No. 292, 95th Cong., 2d Sess. (1978) 14
S. Rep. No. 938, 94th Cong., 2d Sess. (1976) 7, 8
78 Cong. Rec. (1934):
p. 5861 10
p. 5959 10

Rules:

Federal Rules of Civil Procedure:
Fed. R. Civ. P. 8(c) 5

Tax Court Rules:
Tax Ct. R. 210 8
Tax Ct. R. 217 8
Tax Ct. R. 217(a) 8

Secondary Authorities:

Field, *Charitable Lobbying Restraints Held to be Discriminatory*, 15 Tax Notes 91 (April 5, 1982) 6
Troyer, *Charities, Law-Making, and the Constitution: The Validity of the Restrictions on Influencing Legislation*, 31 N.Y.U. Inst. on Fed. Tax 1415 (1973) 19

Miscellaneous:

Appendix of Plaintiff-Appellant, *Taxation With Representation of Washington v. Blumenthal*, 81-1 U.S. Tax Cas. (CCH) ¶ 9329 (D.C. Cir. 1981), *rev'd en banc and vacated as moot sub nom. Taxation With Representation of Washington v. Regan*, 676 F.2d 715 (D.C. Cir. 1982), *appeal docketed*, 51 U.S.L.W. 3001 (U.S. July 6, 1982) (No. 81-2338) 3, 4

TABLE OF AUTHORITIES—Continued

Page

Jurisdictional Statement, *Regan v. Taxation With Representation of Washington*, 676 F.2d 715 (D.C. Cir. 1982), *appeal docketed*, 51 U.S.L.W. 3001 (U.S. July 6, 1982) (No. 81-2338) ..... *passim*

Memorandum in Support of Cross-Motion by Defendants for Summary Judgment, *Taxation With Representation of Washington v. Blumenthal*, 79-1 U.S. Tax Cas. (CCH) ¶ 9185 (D.D.C. 1979) 15

Supplemental Brief for the Appellees on Rehearing *En Banc*, *Taxation With Representation of Washington v. Regan*, 676 F.2d 715 (D.C. Cir. 1982), *appeal docketed*, 51 U.S.L.W. 3001 (U.S. July 6, 1982) (No. 81-2338) 10

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

No. 81-2338

DONALD T. REGAN, SECRETARY OF THE TREASURY, *et al.*,
Appellants,

v.

TAXATION WITH REPRESENTATION OF WASHINGTON,
Appellee.

On Appeal from the United States Court of Appeals for the District of Columbia Circuit

AMICUS CURIAE BRIEF OF THE VETERANS OF FOREIGN WARS OF THE UNITED STATES IN SUPPORT OF APPELLANT'S JURISDICTIONAL STATEMENT

INTEREST OF THE VETERANS OF FOREIGN WARS OF THE UNITED STATES

The Veterans of Foreign Wars of the United States ("VFW") is a federally-chartered veterans' organization. Act of May 28, 1936, ch. 471, § 1, Pub. L. No. 74-630, 49 Stat. 1390. With 1.9 million members, the VFW is one of the largest veterans' organizations in the United States. The VFW engages in a broad range of activities on behalf of veterans, including lobbying. The VFW is funded, in part, by tax-deductible contributions.

If the decision of the court of appeals is upheld, the interests of the VFW could be directly and adversely affected. The court found that appellee's rights to equal protection of the law were violated by a statutory limitation on its ability to lobby with tax-deductible contributions that does not apply to veterans' organizations such as the VFW. The court remanded the case for a determination of whether the constitutional infirmity should be cured by eliminating the lobbying limitation altogether

or by extending that limitation to veterans' organizations. The court recognized that veterans' organizations "would be directly affected" by extension of the lobbying limitation [1] and therefore directed that veterans' organizations be invited to participate on remand. J.S. App. at 77a.

Appellant filed a timely notice of appeal to this Court. J.S. at 2. Asserting that the court of appeals' determination of constitutional invalidity is erroneous, J.S. at 10, appellant has urged that jurisdiction be noted "in order to resolve the important constitutional question presented." J.S. at 12. In a decision of this Court, just as on remand, the status of the VFW under a complex statutory scheme could be altered, perhaps in unintended ways, and the rights accorded to it by the Congress could be abridged. The VFW therefore has a direct and substantial interest in the outcome of this litigation.

SUMMARY OF THE ARGUMENT

This action is the latest in a series of lawsuits brought by the same individuals, acting through appellee and its predecessor corporations, to litigate the same constitutional issues. The independent interests of the judicial system should prompt the Court, *sua sponte*, to consider the issue of *res judicata* in such a case. In addition, this action was commenced under Section 7428 of the Internal Revenue Code,[2] which does not provide for judicial review of constitutional questions that were outside the scope of the administrative proceeding. On either of these grounds the Court could conclude that the case should be dismissed.

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[1] Jurisdictional Statement Appendix at 76a, Taxation With Representation of Washington v. Regan, 676 F.2d 715 (D.C. Cir. 1982), *appeal docketed*, 51 U.S.L.W. 3001 (U.S. July 6, 1982) (No. 81-2338) (hereinafter cited as J.S. App.). The Jurisdictional Statement is hereinafter cited as J.S.

[2] All references to Sections and Regulations herein are to sections of the Internal Revenue Code of 1954, and to the Treasury Regulations promulgated thereunder, as amended to the date of this brief, unless otherwise indicated. 26 U.S.C. § 1, *et seq.* (1976 and Supp. IV 1980); 26 C.F.R. § 1.0 *et seq.* (1982).

Alternatively, although the record in this case is flawed, there is sufficient evidence to allow the Court to reverse the court of appeals on plenary review. The court of appeals misconstrued or ignored legislative history that clearly indicates that the Congress chose to apply different rules where it had different concerns. Such deliberate distinctions, particularly in the area of federal taxation, do not violate appellee's rights to equal protection. If the Court is not prepared to reverse on this basis, however, this proceeding should be recommenced *ab initio*, rather than on a limited remand.

ARGUMENT

I. THE COURT SHOULD DISMISS THE CASE ON GROUNDS OF *RES JUDICATA* OR BECAUSE THE COURT LACKS JURISDICTION TO ADJUDICATE THE CONSTITUTIONAL QUESTIONS AT ISSUE.

A. The Court should consider, *sua sponte*, the problem of *res judicata* that arises from the history of appellee's litigating activities.

Appellee is the most recently formed in a succession of corporate entities utilized by the same few individuals to carry on a program of legislative and administrative reform in the federal tax area. This case is the third attempt by these individuals, acting through appellee and its privies, to litigate the same constitutional issues.

Appellee itself was formed "to absorb and carry forward" the activities of two other nonprofit organizations, Taxation with Representation ("TWR") and the Taxation with Representation Fund ("TWR Fund"); the TWR Fund was formerly known as Tax Analysts and Advocates ("TA/A").[3] In response to the question of whether it had ever filed for an employer identification number, appellee stated that it had done so under the names of

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[3] Appendix of Plaintiff-Appellant at 11, Taxation With Representation of Washington v. Blumenthal, 81-1 U.S. Tax Cas. (CCH) ¶ 9329 (D.C. Cir. 1981), *rev'd en banc and vacated as moot*, 676 F.2d 715 (hereinafter cited as A.).

TWR and TA/A. A. at 47. The merger plans contemplated greater efficiency "if the charitable functions of these two groups could be united in a single organization". A. at 18. Appellee has the same chief executive, Thomas F. Field, as TWR and TWR Fund, A. at 16, and employs the same attorney (*Compare* A. at 6 *with Taxation With Representation v. United States*, 585 F.2d 1219, 1220 (4th Cir. 1978), *aff'g* 76-2 U.S. Tax. Cas. (CCH) ¶ 9693 (E.D. Va. 1976), *cert. denied*, 441 U.S. 905 (1979)). It is thus clear that appellee was created to be the successor in interest to TWR and TWR Fund, to assume their functions and to carry on their programs, and that there is an identity of interest between appellee and the two original organizations.

In 1973, TWR Fund filed suit seeking a declaratory judgment that the restriction on lobbying by charitable organizations was unconstitutional. In 1974, the suit was dismissed on jurisdictional grounds. *Tax Analysts and Advocates v. Shultz*, 376 F. Supp. 889 (D.D.C. 1974), *appeal dismissed mem. sub nom. Tax Analysts and Advocates v. Simon*, 512 F.2d 992 (D.C. Cir. 1975). In 1975, TWR instituted an action raising the same claims at issue herein. The Court of Appeals for the Fourth Circuit, affirming the district court, held that neither the First nor the Fifth Amendment rights of TWR had been violated as a result of the statutory scheme. *Taxation With Representation v. United States.* Appellee was incorporated on June 14, 1977, A. at 24, and brought the present action on May 10, 1978. A. at 3.

If one compares the instant case with the TWR litigation, one finds identical issues, common control of the actions and the entities by the same individuals, common counsel, continuity of function (or at least proposed continuity), and a final judgment in the earlier litigation. Thus, although appellee is legally distinct in its corporate form from TWR, the traditional *res judicata* or preclusion principles apply. *Pick Mfg. Co. v. General Motors Corp.*, 80 F.2d 639 (7th Cir. 1935); *Performance Plus*

Fund, Ltd. v. Winfield & Co., 443 F. Supp. 1188 (N.D. Cal. 1977).

Although *res judicata* and collateral estoppel are waivable affirmative defenses under Fed. R. Civ. P. 8(c), federal trial and appellate courts in appropriate cases have addressed the issue *sua sponte*. *See* J.S. App. at 84a, n.9 (discussion by dissenting judges in court of appeals). The reasons cited in such cases for independent consideration include the conservation of judicial resources, the promotion of finality in litigation, and the fostering of reliance on judicial decisions. It is for these reasons, quite apart from any consideration of the interest of appellant and thus without reference to the failure of appellant to raise the affirmative defense below, that the Court should take cognizance of the *res judicata* question.

The facile use of multiple corporations in this case highlights the potential for abuse of the judicial system by nonprofit organizations, and should lead the Court to consider the question of preclusion *sua sponte*. Entities seeking recognition of tax-exempt status are almost by definition made of paper, organized with a minor commitment of funds or resources. A nonprofit corporation can be created in almost any jurisdiction for a cost not exceeding a hundred dollars, by one or a few individuals who assume no liability or responsibilities thereby. If appellee in its present corporate form had not found a favorable response in this particular court of appeals, it would have been only too easy for its president and counsel to raise the issue again in yet another judicial circuit through a new corporate entity. Unless the principles of *res judicata* impose some meaningful limit, a single individual with a sufficient commitment to almost any issue can move through the courts in a succession of nonprofit corporate shells, consuming the resources of the judicial system in continuing reconsideration of his own preoccupation.

Although the dissent suggests that a consideration of the *res judicata* issue would require a remand, J.S. App.

at 84a, n.9, there is no compelling reason why this should be so. The record now before the Court sets forth completely the litigating pattern of appellee and its predecessors, and contains sufficient information to identify precisely their interrelationship.[4] The factual basis for a decision is thus present, and no substantial interest would be served by remand of the case for fact-finding on this issue.

B. The Court lacks jurisdiction to adjudicate constitutional issues in a case brought under Section 7428.

Appellee commenced this action in federal district court under Section 7428, seeking review of an Internal Revenue Service determination with respect to its exempt status.[5] Section 7428 is much more limited in scope than the general declaratory judgment jurisdiction provisions, however, and does not provide for judicial review of constitutional questions that were not, and could not have been, at issue in the administrative proceeding. Jurisdiction is thus limited to the question of whether the Internal Revenue Service properly applied existing law to the facts presented to it.

Declaratory judgment actions under the internal revenue laws are generally barred by statute. *See* Section 7421 and 28 U.S.C. § 2201. Prior to enactment of Section 7428, therefore, an entity whose application for exempt status under Section 501(c)(3) had been denied by the Internal Revenue Service could seek judicial review of the adverse ruling only through a deficiency proceeding or tax refund suit. In *Bob Jones University v. Simon*, 416 U.S. 725 (1974) and *Alexander v. "Americans*

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[4] Appellee's president has published a narrative history of the "decade-long effort" that he and his attorney undertook through successive corporate forms in this series of lawsuits. Field, *Charitable Lobbying Restraints Held to be Discriminatory*, 15 Tax Notes 91 (April 5, 1982). The description of the demise of TWR and the present plans for TWR Fund suggests that the action herein may actually be moot. *Id.* at 91, n.6.

[5] Jurisdiction of the district court over actions brought under Section 7428 rests on 28 U.S.C. § 1346(e).

United", Inc., 416 U.S. 752 (1974), this Court pointed out that the difficulties in securing judicial review of administrative determinations gave the Commissioner of Internal Revenue inordinate power over charitable organizations. In response, the Congress enacted Section 7428 as a limited exception to Section 7421, to allow for judicial review of the Internal Revenue Service's administrative determinations as to exempt status. The scope of such review and the nature of the relief contemplated, however, are quite limited. Specifically, since the court's role is to review the correctness of the Commissioner's administrative determination, the court may not consider an issue that the Commissioner himself is precluded from considering.

In *Houston Lawyer Referral Service, Inc. v. Commissioner*, 69 T.C. 570 (1978), the Tax Court noted that an action under Section 7428 "is called a declaratory judgment, but it has much narrower scope than exists in respect of declaratory judgment litigation in the United States District Courts generally." *Id.* at 573. The court pointed out that the legislative history of the provision indicates that "the court is to base its determination upon the reasons provided by the Internal Revenue Service in its notice to the party making the request for a determination, or based upon any new argument which the Service may wish to introduce at the time of the trial." *Id.* at 573-574. Furthermore, a court may not issue a declaratory judgment under Section 7428 unless it "determines that the organization involved has exhausted administrative remedies available to it within the Internal Revenue Service." Section 7428(b)(2); *see* S. Rep. No. 938, 94th Cong., 2d Sess. 590 (1976), *reprinted in* [1976] U.S. Code Cong. & Ad. News 3439, 4014. The Tax Court has stated that the requirement of exhaustion of administrative remedies is the basis for its rule that "disposition of an action for declaratory judgment, which does not involve a revocation, will ordinarily be made on the basis of the administrative record . . . ." 69 T.C. at 574; *see*

Tax Ct. R. 217(a). In *Houston Lawyer Referral Service* and a line of subsequent actions brought under Section 7428, the Tax Court has refused to consider evidence not contained in the administrative record, reiterating that "our function with respect to declaratory judgment proceedings is to review respondent's administrative determination." *Church in Boston v. Commissioner*, 71 T.C. 102, 105 (1978). The U.S. District Court for the District of Columbia has specifically adopted the Tax Court's rule limiting the scope of judicial review to the administrative record.[6]

The limited scope of review in proceedings under Section 7428 requires that not only new evidence but also new issues or arguments be excluded.

> The reason an interested party is required to exhaust his administrative remedies by presenting all of his objections to the Commissioner is to insure that the Commissioner has had an opportunity to rule on such matters before the petitioner requests this court to review the Commissioner's action. As to allegations in the petition not previously raised . . . the Commissioner has had no opportunity to pass on such matters, and therefore there is no action by him with respect to such matters for us to review.

Thompson v. Commissioner, 71 T.C. 32, 37 (1978).[7]

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[6] Southwest Virginia Professional Standards Review Organization, Inc. v. U.S., 78-2 U.S. Tax Cas. (CCH) ¶ 9747 (D.D.C. 1978); *see also*, Virginia Professional Standards Review Foundation v. Blumenthal, 466 F. Supp. 1164 (D.D.C. 1979).

[7] *Thompson v. Commissioner* involved a declaratory judgment action under Section 7476 with respect to an employee pension plan. Tax Court Rule 217, however, applies equally to declaratory judgment actions under Sections 7476 and 7428. Tax Ct. R. 210; *see* S. Rep. No. 938, 94th Cong., 2d Sess. 588 (1976), *reprinted in* [1976] U.S. Code Cong. & Ad. News 3439, 4012 ("Insofar as possible, [section 7428] rules should conform to the rules that the Tax Court develops with regard to declaratory judgment suits as to retirement plans, under section 7476 of the Code.").

It seems quite clear, therefore, that Section 7428 was not intended to provide jurisdiction for review of the constitutional questions here at issue. The function of a court in this limited declaratory judgment proceeding is simply to review the correctness of the Commissioner's administrative determination. Because the Commissioner is without power to declare a tax statute unconstitutional,[8] there could not have been an administrative determination of appellee's constitutional claims. Consideration of the constitutional issues by the district court was thus necessarily *de novo*, both as to the issues and as to the facts necessary to support the equal protection claim. Since the district court could not properly consider such matters *de novo*, there was no jurisdiction in that court to review appellee's constitutional claims. As to such claims, the Court should find that the original jurisdictional inadequacy cannot be waived, and that such issues cannot be reviewed in this proceeding. *See California v. Grace Brethren Church*, 50 U.S.L.W. 4703, 4709 (U.S. June 15, 1982), in which the Court declined to consider First Amendment claims in an appeal brought under 28 U.S.C. § 1252, after determining that the district court lacked jurisdiction by reason of the Tax Injunction Act, 28 U.S.C. § 1341.

II. THERE IS SUFFICIENT EVIDENCE IN THE RECORD TO ALLOW THE COURT TO REVERSE THE COURT OF APPEALS ON PLENARY REVIEW.

The decision by the court of appeals with respect to appellee's equal protection claim rested upon its finding that "[n]o identifiable governmental interests justify the differential tax treatment of lobbying by veterans' groups and Section 501(c)(3) organizations." J.S. App. at 67a. Although the record before the Court is flawed, it pro-

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[8] In Johnson v. Robison, 415 U.S. 361, 368 (1974), the Court noted that "adjudication of the constitutionality of congressional enactments has generally been thought beyond the jurisdiction of administrative agencies." *See also* Weinberger v. Salfi, 422 U.S. 749, 765 (1975).

vides sufficient evidence to contradict such finding and to allow the Court on plenary review to reverse the decision below.[9]

As appellant has indicated, "[i]n contradistinction to the situation presented by Section 501(c)(3) organizations, Congress has not identified any problem in according tax benefits to veterans' organizations because of their lobbying activities."[10] The legislative history makes clear that Congress regarded the use of deductible contributions to fund lobbying efforts by Section 501(c)(3) organizations as presenting a serious problem, in that such efforts might be directed to the furtherance of private rather than institutional interests. Congress was aware that the lobbying restriction that it was enacting would not be imposed on all tax-exempt organizations, and must therefore have intended the lobbying limitation to apply only where an abuse had been identified. 78 Cong. Rec. 5861, 5959 (1934).[11]

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[9] The VFW endorses the position set out in appellant's Jurisdictional Statement that the standard of review to be applied in determining the constitutionality of distinctions drawn between veterans' groups and Section 501(c)(3) organizations is whether such distinctions are rationally related to the achievement of a legitimate governmental purpose. J.S. at 12-23, *see also*, San Antonio Independent School District v. Rodriguez, 411 U.S. 1, 40-41 (1973); Madden v. Kentucky, 309 U.S. 83, 87-88 (1940).

[10] Supplemental Brief for the Appellees on Rehearing *En Banc* at 39, Taxation With Representation of Washington v. Regan.

[11] The court of appeals was troubled by the question of legislative intent because it misconstrued the legislative history of the Revenue Act of 1934. The limitation on lobbying in Section 23(o)(2) of that Act originated in the Senate. During the Senate debate, the distinction drawn in the lobbying rule between various classes of tax-exempt organizations was noted and questioned. It was agreed that the amendment would be reexamined by the conferees. 78 Cong. Rec. 5959 (1934). The majority interprets the subsequent failure of the conferees to revise the Senate language as "oversight." J.S. App. at 52a. Since the issue was raised during the Senate debate, however, the failure of the conferees to revise the amendment can be construed only as *approval* of the line drawn in the Senate. Hence, from the inception of the lobbying rules, favor-

Despite extensive review from 1969 to 1978 of the rules affecting both tax-exempt status and the charitable contribution deduction, Congress did not disturb the special tax treatment accorded veterans' groups. *See* J.S. at 17-18. Throughout this period, Congress held lengthy hearings and considered numerous bills relating to the legislative activities of tax-exempt organizations.[12] The provisions finally enacted after this extended consideration were designed to provide greater specificity and predictability in the rules relating to the lobbying activities of Section 501(c)(3) organizations. *See* Sections 501(h) and 4911, added by Sec. 1307 of the Tax Reform Act of 1976, Pub. L. No. 94-455, 90 Stat. 1520, 1720, 1723. These new lobbying provisions, enacted after eight years of continuous legislative activity in the exempt organization area, left intact the ability of veterans' organizations to lobby with tax-deductible contributions. The implicit determination by the Congress in 1976 that lobbying limits were not to be extended to veterans' groups is particularly significant in view of its 1972 review and sub-

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able treatment of veterans' groups has been the product of deliberate Congressional action, and reflects a perceived potential for abuse by one group but not another.

[12] *See, e.g., Tax Reform, 1969: Hearings on the Subject of Tax Reform Before the House Comm. on Ways and Means*, 91st Cong., 1st Sess., Parts 1-4 (1969); *Tax Reform Act of 1969: Hearings on H.R. 13270 Before the Senate Comm. on Finance*, 91st Cong., 1st Sess., Parts 5 and 6 (1969); *Legislative Activity by Certain Types of Exempt Organizations: Hearings Before the House Comm. on Ways and Means*, 92d Cong., 2d Sess. (1972); *General Tax Reform: Hearings on the Subject of General Tax Reform Before the House Comm. on Ways and Means*, 93d Cong., 1st Sess., Parts 4, 15 (1973); *Influencing Legislation By Public Charities: Hearings on H.R. 13500 Before the House Comm. on Ways and Means*, 94th Cong., 2d Sess. (1976); S.1408, 92d Cong., 1st Sess., 117 Cong. Rec. 8518 (1971); S.3063, 92d Cong., 2d Sess., 118 Cong. Rec. 844 (1972); H.R. 13720, 92d Cong., 2d Sess. (1972); H.R. 4994, 93d Cong., 1st Sess. (1973); H.R. 5095, 93d Cong., 1st Sess. (1973); H.R. 14443, 93d Cong., 2d Sess. (1974); H.R. 8021, 94th Cong., 1st Sess. (1975); S.2832, 94th Cong., 1st Sess., 121 Cong. Rec. 42029-30 (1975); H.R. 13500, 94th Cong., 2d Sess. (1976).

stantial revision of the tax treatment of exempt veterans' organizations. *See* Sections 501(c)(19) and 512(a)(4), added by Act of Aug. 29, 1972, Pub. L. No. 92-418 § 2, 86 Stat. 656. The court below was thus in error in concluding that "the tax preferences for lobbying by veterans' organizations reflect no policy, but simple lack of attention and consistency on the part of Congress and the IRS." J.S. App. at 56a.

The special treatment accorded veterans' groups may also be justified on the basis of the "unique status of veterans' organizations in our society." *Id.* at 114a (MacKinnon, J., dissenting); *see also, Taxation with Representation v. U.S.*, 585 F.2d 1219, 1224 (4th Cir. 1978), *cert. denied*, 441 U.S. 905 (1979). Such treatment is consistent with a longstanding nationwide system of federal and state assistance to veterans that "has been sustained repeatedly against constitutional attack." J.S. at 19. The nature and role of veterans' organizations amply supports any preference they may enjoy with respect to the use of tax-deductible contributions. As the dissent pointed out

> War veterans have made unparalleled contributions to the creation and preservation of this nation. Their organizations have existed in this country from the beginning. These organizations have sought to aid disabled veterans, to assist their widows and orphans, and to provide for mutual support and assistance among those who served their country in time of war. *See generally* W. Glasson, Military Pension Legislation (1900). Some of these organizations play a vital continuing role in the administration of laws benefitting veterans, as Congress has specifically recognized and provided for. *See, e.g.*, 38 U.S.C. § 3402(a) (1976) (permitting veterans' organizations to represent veterans in presenting claims to Veterans Administration and the furnishing of office space to them). The close coordination between veterans' organizations and the government is unique. Congress has continued to acknowledge the importance of veterans' organizations by incorporating them with federal charters in order to permit them to carry out

their philanthropic purposes. *See, e.g.*, Pub. L. No. 97-83, 90 Stat. 1094 (Nov. 20, 1981) (chartering United States Submarine Veterans of World War II). Because of the important and unique public role played by veterans' groups, Congress could properly regard them as a different kind of entity deserving *tax* treatment different from that accorded the more generally described charitable organizations subject to section 501(c)(3). (footnote omitted).

J.S. App. at 115a-116a (MacKinnon, J., dissenting).

III. IF THE COURT IS NOT PREPARED TO DISMISS OR TO REVERSE, THEN THE PROCEEDING SHOULD BE RECOMMENCED *AB INITIO*.

A. Veterans' groups should participate in developing the record in this case.

If the Court determines that the record is insufficient to support outright reversal, then the only appropriate recourse is to have the proceeding recommenced with veterans' organizations as participants.

1. *The record below regarding the VFW is replete with error.*

Virtually every assertion made by the court of appeals with respect to the VFW is incorrect or misleading. Since a decision with respect to appellee's equal protection claim is necessarily based upon an understanding of the function of veterans' groups, the interests of justice require that a final decision in this case be made upon the basis of a record that is accurate from the outset.

The court of appeals asserted that "the Code provides open-ended subsidization of any position that [veterans'] groups choose to espouse. . . ." J.S. App. at 71a-72a. The supporting footnote states that "veterans' organizations have not restricted their lobbying to issues of particular importance to veterans, such as veterans' benefit programs," and refers in three instances to the VFW. *Id.* at 72a, n.49. The subject considered in the footnote is the proposed Panama Canal treaties. In fact, the VFW

was *invited* to appear before the Senate Committee on Foreign Relations in regard to the proposed treaties. *See Panama Canal Treaties: Hearings Before the Senate Comm. on Foreign Relations*, 95th Cong., 1st Sess. 566 (1977) (statement of Col. Phelps Jones), *cited in* J.S. App. at 72a, n.49. Consequently, the VFW requested to testify at the House committee hearing on the same subject. The VFW testimony was given under the authority of a mandate unanimously adopted at its national convention. *See Proc. of the 78th Nat. Convention of the Veterans of Foreign Wars of the United States*, H.R. Doc. No. 292, 95th Cong., 2d Sess. 25, 66 (1978). Concern with matters affecting national security, such as the proposed Panama Canal treaties, is well within the VFW's Congressional mandate. The federal charter of the VFW provides that the organization is "to maintain and extend the institutions of American Freedom, and to preserve and defend the United States from all her enemies, whomsoever." 36 U.S.C. § 113 (1976). Like all entities exempt from income tax under any of the subsections of Section 501, the VFW must be able to establish that all of its activities, including its lobbying activities, are in furtherance of its exempt purposes. Consequently, lobbying activities outside that scope could jeopardize the VFW's exempt status. *See* Treas. Reg. §§ 1.501(c)(19)-1(a)(1) and (c). The Internal Revenue Code thus provides no "open-ended subsidization of any position" that the VFW chooses to espouse. The examples cited by the majority contradict, rather than support, its misconceived view of VFW activities.

The court of appeals also indicates that "[p]erhaps as a result of [the] uneven treatment" of different organizations in Section 501(c), "veterans' groups such as the American Legion and the Veterans of Foreign Wars are active before Congress on a large number of different issues." J.S. App. at 23a. In a supporting footnote, reference is made to four VFW appearances before Congressional committees. Two of the four appearances were not

authorized by the VFW; even in those instances, however, the speakers limited their comments to veterans' affairs. In the other two appearances, the VFW participants confined their remarks to matters affecting veterans' organizations. Again the court is misled and wrongly influenced by its lack of factual data and its misconception of the role of veterans' organizations.

2. *Veterans' organizations could provide further information in support of their specific tax code treatment.*

The fundamental legal issue presented by appellee's equal protection claim is whether special treatment of veterans' organizations in the Internal Revenue Code is justified. *No information regarding veterans' organizations was ever formally adduced during this proceeding.* J.S. App. at 49a. Appellee, of course, had no interest in presenting such information, and in the district court, appellant made only a perfunctory effort to do so. Memorandum in Support of Cross-Motion by Defendants for Summary Judgment at 40, *Taxation With Representation of Washington v. Blumenthal.* Were it not for extensive judicial factfinding by the court of appeals, the record would be almost devoid of explication of the basis of the special treatment of veterans' organizations. *See* J.S. App. at 115a-120a.

The court below portrays the VFW as an omnipresent lobbyist, promoting its views on the issues of the day, thereby curtailing appellee's right to equal protection of the law. *Id.* at 23a, n.11. The actual operation of the VFW differs strikingly from this specter. During the two-year period beginning on June 17, 1980, the VFW authorized 83 appearances before Congressional committees, 76 (92 percent) of which were at the invitation of the committee and *all* of which were related to veterans' affairs. In fact, not only are virtually all of the VFW's Congressional appearances in furtherance of its exempt purpose, but a substantial portion of the related expenditures

would appear not even to constitute "lobbying expenditures" under the Internal Revenue Code. *Cf.* Sections 4911(d)(2)(B) and 501(h).

Recalling that Congressional concern with the use of tax-deductible contributions to further private rather than institutional interests underlies the Section 501(c)(3) lobbying limitation, it is readily apparent why veterans' organizations are not subject to a similar limitation. The VFW has approximately 1,900,000 members. Its purposes are set forth in a federal charter and its institutional programs are adopted at a national convention, the proceedings of which are required by statute to be reported to Congress. 36 U.S.C. § 118 (1976). Legislative positions are adopted pursuant to an elaborate administrative framework, designed to sanction only those proposals of essential interest to the VFW's objectives. Almost all VFW Congressional appearances are made by invitation of the relevant committee, and relate to veterans' affairs. Thus, the court below is plainly in error when it says: "[t]here is no evidence whatsoever that the lobbying of veterans is less subject to abuse by private interests than that of other Section 501(c) groups." J.S. App. at 64a-65a.

These observations are consistent with the central role that veterans' organizations play in the relationship between veterans and the federal government. Indeed, that role is so deeply ingrained in the structure of the federal government that in many respects veterans' organizations such as the VFW function as quasi-governmental entities. The VFW represents veterans before the Veterans Administration, and occupies office space at the agency for that purpose. The VFW provides this service to any veteran, not just VFW members. The VFW also represents veterans before military boards, and occupies government office space for this purpose as well. Through its myriad state and local units the VFW is in constant touch with veterans throughout the nation. In view of the extensive, continuing contact between the VFW and veterans, and

the complexity and number of veterans' programs, Congress expects the VFW to advise it on all concerns relating to veterans' affairs. Thus, the VFW acts as an essential intermediary between veterans and the Congress. It is appropriate that such vital communications should be facilitated by the special treatment accorded veterans' groups in the Internal Revenue Code.

B. The issues involved in fashioning a remedy in this case were not adequately considered by the court of appeals.

The court of appeals held that the absence of a restriction upon the lobbying activities of veterans' groups comparable to that imposed upon charitable organizations violates equal protection principles. The court remanded the case to the district court to fashion a remedy, either by eliminating the lobbying restrictions of Section 501(c)(3) or by imposing lobbying restrictions upon veterans' groups. Even if one were to assume that an equal protection problem exists, however, the court of appeals' analysis of the remedy, based upon an inadequate record, does not take adequate account of the complexity of the statutory scheme.

Sections 501 and 170 apply distinct and complex rules to a large number of dissimilar organizations. Charitable organizations are exempt from tax under Section 501(c)(3) provided that the organizations do not engage to a substantial extent in lobbying. Such organizations may elect, under Section 501(h), to have their lobbying expenditure "allowance" measured by a sliding-scale percentage of total expenditures. Contributions to charitable organizations are deductible, provided that such organizations are not "disqualified for tax exemption under Section 501(c)(3) by reason of attempting to influence legislation." Section 170(c)(2).

Veterans' organizations may be exempt from tax under the specific provision of Section 501(c)(19) or under the more generally applicable provisions of Sections 501(c)(4) and 501(c)(7). Contributions to such groups are

deductible under Section 170(c)(3). None of these provisions imposes a specific restriction on lobbying. Treasury Regulations § 1.170A-1(h)(5) provides, however, that no deduction shall be allowed under Section 170 for amounts paid to any organization "a substantial part of the activities of which is carrying on propaganda, or otherwise attempting to influence legislation." Although this regulation provision includes a reference to Section 501(c)(3) and its regulations "for purposes of determining whether an organization is attempting to influence legislation," its application is not limited to organizations whose tax exemption rests upon Section 501(c)(3).

The court of appeals found that Treasury Regulations § 1.170A-1(h)(5) by its terms would prohibit deductibility of contributions to veterans' groups that engage in substantial lobbying, but apparently accepted the statement of appellant's counsel that through some kind of administrative forebearance the rule is not actually applied. J.S. App. at 22a. If the Internal Revenue Service were to enforce its regulations in this respect, veterans' organizations would actually be subject to more stringent lobbying limits than charitable organizations, since veterans' organizations are not eligible to file an election under Section 501(h).

At the initial levels of consideration of this case, appellee included in its equal protection argument not only veterans' groups but also fraternal beneficiary societies, which are exempt from tax under Sections 501(c)(8) and 501(c)(10). Contributions by individuals to such societies are deductible under Section 170(c)(4), provided the contributions are to be used exclusively for religious, charitable, or educational purposes. There are not statutory restrictions on lobbying applicable to fraternal beneficiary societies. Treasury Regulations § 1.170A-1(h)(5) should apply to fraternal beneficiary societies to the same extent it applies to veterans' groups. If one gives no effect to this regulation, however, it appears that contributions to fraternal beneficiary societies for federal income tax and

gift tax purposes [13] are deductible to the extent that such contributions are used to support activities that are charitable or educational in nature, and that such societies can thus use deductible contributions to lobby, even to a "substantial" extent, so long as the lobbying is charitable in nature.[14]

It would appear from this very abbreviated analysis that fraternal beneficiary societies occupy a position distinct from that of both charitable and veterans' organizations. If Treasury Regulations § 1.170A-1(h)(5) were enforced, fraternal beneficiary societies and veterans' groups would not be able to receive deductible contributions if they lobbied to more than an insubstantial extent. Since such groups are not eligible to file the favorable Section 501(h) election, they would thus be disadvantaged by comparison to charitable groups. If Section 170 were applied without reference to Treasury Regulations § 1.170A-1(h)(5), both fraternal beneficiary societies and veterans' groups would be allowed to receive deductible contributions without regard to the extent of their lobbying. However, all activities of fraternal beneficiary societies funded with deductible contributions, including lobbying, would have to qualify as charitable or educational in nature, while veterans' groups could use deductible contributions to fund lobbying on both charitable issues and the more broadly defined matters of veterans' interest.

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[13] For federal estate tax purposes, bequests or legacies to a fraternal beneficiary society are deductible only if the society "would not be disqualified for tax exemption under section 501(c)(3) by reason of attempting to influence legislation." Section 2055(a)(3).

[14] For purposes of Sections 501 and 170, lobbying in furtherance of a charitable purpose is itself a charitable activity. When a particular statutory provision such as Section 170(c)(4) contains no explicit limit on lobbying, therefore, such a limit cannot be read into the statutory reference to charitable purposes. Troyer, *Charities, Law-Making, and the Constitution: The Validity of the Restrictions on Influencing Legislation*, 31 N.Y.U. Inst. on Fed. Tax 1415, 1422-1425 (1973).

The relationship among the various provisions of Sections 501 and 170 is obviously more complex than the court of appeals recognized. Even if it were determined that the distinctions drawn among the different classes of organizations raise an equal protection problem, the problem cannot be cured by either of the remedies presented for consideration by the district court. Specifically, the problem could not be cured by imposing a limit on the lobbying of veterans' groups, since such a remedy would leave veterans' groups without the relief afforded by Section 501(h) to charitable organizations, and would leave fraternal beneficiary societies either disadvantaged (if the Treasury applies its regulations) or unduly advantaged with respect to charitable organizations. If the Court finds grounds for an equal protection claim in the record before it, the case must be sent back to the district court not with the inadequate remand instructions of the court of appeals, but with a mandate to begin afresh to review and evaluate the broad statutory scheme.

CONCLUSION

Probable jurisdiction should be noted.

Respectfully submitted,

Of Counsel:
GEORGE H. GANGWERE
LAWRENCE M. MAHER
SWANSON, MIDGLEY, GANGWERE, CLARKE & KITCHIN
1500 Commerce Bank Building
Kansas City, Missouri 64106

WILMER S. SCHANTZ, JR.
6736 Old McLean Village Drive
McLean, Virginia 22101

SHELDON S. COHEN
Counsel of Record
JULIE NOEL GILBERT
DENNIS B. DRAPKIN
LINDA F. WORRELL
COHEN AND URETZ
Suite 400
1775 K Street, N.W.
Washington, D.C. 20006
Telephone: (202) 835-7300
Counsel for the Veterans of Foreign Wars of the United States

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No. 81-2338

In the Supreme Court of the United States

OCTOBER TERM, 1982

DONALD T. REGAN, SECRETARY OF THE TREASURY, ET AL.,
APPELLANTS

v.

TAXATION WITH REPRESENTATION OF WASHINGTON

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE APPELLANTS

REX E. LEE
Solicitor General

GLENN L. ARCHER, JR.
Assistant Attorney General

LAWRENCE G. WALLACE
Deputy Solicitor General

STUART A. SMITH
Assistant to the Solicitor General

RICHARD FARBER
ROBERT S. POMERANCE
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTION PRESENTED

Sections 170(c) and 501(c) of the Internal Revenue Code of 1954 grant to charitable and other organizations described in Section 501(c)(3) tax-exempt status and eligibility to receive tax-deductible contributions under Section 170(c)(2) on the condition that "no substantial part of the [organization's] activities * * * is carrying on propaganda, or otherwise attempting, to influence legislation." The statute does not impose this restriction against influencing legislation on veterans' organizations that qualify for tax-exempt status under Section 501(c)(19) and for the receipt of tax-deductible contributions under Section 170(c)(3). Pursuant to these statutory directives, the Internal Revenue Service denied appellee recognition as an organization described in Sections 501(c)(3) and 170(c)(2) because a substantial part of its activities consists of attempting to influence legislation.

The question presented is whether Congress' use of different standards with respect to the degree of permissible legislative activities by veterans' organizations and other categories of tax-exempt organizations violates appellee's right to equal protection guaranteed by the Fifth Amendment.[1]

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[1] In addition to Donald T. Regan, the Secretary of the Treasury, appellants include Roscoe L. Egger, Jr., the Commissioner of Internal Revenue, and the United States.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statutes involved	2
Statement	2
Argument:	
Congress' decision to restrict the degree of permissible legislative activities by certain categories of organizations as a condition for tax-exempt status and eligibility to receive tax-deductible contributions, and not to impose such restrictions upon veterans' organizations qualifying for these tax benefits, does not violate the equal protection guaranty of the Fifth Amendment	9
Introduction and summary	9
A. Congress' use of different standards with respect to the degree of permissible legislative activities by veterans' organizations and other categories of tax-exempt organizations is not subject to strict judicial scrutiny but must be upheld if supported by a rational basis	15
1. Congress has broad discretion to draw distinctions in framing revenue statutes which in its judgment produce a reasonable system of taxation	15
2. The distinction in the tax-exempt provisions between charitable and other organizations (Section 501(c)(3)) and veterans' organizations (Section 501(c)(19)) is not invidious and does not abridge any of appellee's rights under the Constitution	19

Argument—Continued Page

B. Congress' imposition of different standards with respect to the lobbying activities of veterans' organizations and other categories of tax-exempt organizations rationally furthers the legitimate ends of the exempt organizations provisions 29

1. The lobbying limitation addresses a specific problem recognized by Congress 31

2. The unique status of veterans' organizations amply justifies the less restrictive lobbying limitations granted them by Congress 45

Conclusion 50

TABLE OF AUTHORITIES

Cases:

"Americans United" Inc. v. *Walters*, 477 F.2d 1169, rev'd on jurisdictional grounds, 416 U.S. 752 20
Alexander v. *"Americans United" Inc.*, 416 U.S. 752 39
Animal Protection Institute, Inc. v. *United States*, 42 A.F.T.R.2d (P-H) ¶ 78-5234 44
Associated Industries v. *Commissioner*, 7 T.C. 1449, acq., 1947-1 Cum. Bull. 1 49
August v. *Bronstein*, 369 F. Supp. 190, summarily aff'd, 417 U.S. 901 46
Bannerman v. *Department of Youth Authority*, 436 F. Supp. 1273 46
Better Business Bureau v. *United States*, 326 U.S. 279 23
Bob Jones University v. *Simon*, 416 U.S. 725 5
Boone v. *Lightner*, 319 U.S. 561 46
Branch v. *Du Bois*, 418 F. Supp. 1128 46
Buckley v. *Valeo*, 424 U.S. 1....13, 14, 22, 23, 24, 29, 30, 41
Burroughs & Cannon v. *United States*, 290 U.S. 534 (1934) 31
California Medical Association v. *FEC*, 453 U.S. 182 ..... 44, 49

Cases—Continued **Page**

Cammarano v. *United States*, 358 U.S. 498 ..... *passim*
Carmichael v. *Southern Coal & Coke Co.*, 301 U.S. 495 ..... 17, 32, 48
Carey v. *Brown*, 447 U.S. 455 28
Central Hudson Gas & Electric Corp. v. *Public Service Commission*, 447 U.S. 557 28
Christian Echoes National Ministry, Inc. v. *United States*, 470 F.2d 849, cert. denied, 414 U.S. 864.. 20, 31
Commissioner v. *Sullivan*, 356 U.S. 27 ..... 19, 24
Consolidated Edison Co. v. *Public Service Commission*, 447 U.S. 530 28
Coxe v. *Commissioner*, 5 B.T.A. 261 34
Ensminger v. *Commissioner*, 610 F.2d 189 18
Est of Hawaii v. *Commissioner*, 71 T.C. 1067, aff'd, 647 F.2d 170 44
Fales v. *Commissioner*, 9 B.T.A. 828 34
Feinerman v. *Jones*, 356 F. Supp. 252 46
First National Bank v. *Bellotti*, 435 U.S. 765..... 27, 28
Flint v. *Stone Tracy Co.*, 220 U.S. 107 17
Forstall v. *Commissioner*, 29 B.T.A. 428 34
Frederick v. *United States*, 507 F.2d 1264 46
F.S. Royster Guano Co. v. *Commonwealth of Virginia*, 253 U.S. 412 29
Grosjean v. *American Press Co.*, 297 U.S. 233 18
Harris v. *McCrae*, 448 U.S. 297 ..... 13, 18, 22, 23, 24, 29
Haswell v. *United States*, 500 F.2d 1133, cert. denied, 419 U.S. 1107 ..... 20, 24, 27, 31, 39
Healy v. *James*, 408 U.S. 169 28
Helvering v. *Bliss*, 293 U.S. 144 33
Hilton v. *Sullivan*, 334 U.S. 323 47
Houston Lawyer Referral Service v. *Commissioner*, 69 T.C. 570 44
Hynes v. *Mayor of Oradell*, 425 U.S. 610 28
Jefferson v. *Hackney*, 406 U.S. 535 29
Johnson v. *Robison*, 415 U.S. 361 ..... 14, 29, 46, 47
Kahn v. *Shevin*, 416 U.S. 351 18
Katzenbach v. *Morgan*, 384 U.S. 641 ..... 14, 29, 30
Kellems v. *Commissioner*, 58 T.C. 556, aff'd per curiam, 474 F.2d 1399, cert. denied, 414 U.S. 831 18
Kirk v. *Commissioner*, 425 F.2d 492, cert. denied, 400 U.S. 853 11

Cases—Continued Page

Koelfgen v. *Jackson*, 355 F. Supp. 243 aff'd mem., 410 U.S. 976 46
Kuper v. *Commissioner*, 332 F.2d 562, cert. denied, 379 U.S. 920 27
Lehnhausen v. *Lake Shore Auto Parts Co.*, 410 U.S. 356 ..... 17, 18
Le Maistre v. *Leffers*, 333 U.S. 1 46
Madden v. *Kentucky*, 309 U.S. 83 ..... 17, 18
Maher v. *Roe*, 432 U.S. 464 ..... 13, 18, 21, 23, 24, 27, 29
Marker v. *Shultz*, 485 F.2d 1002 ..... 44, 49
Metromedia, Inc. v. *City of San Diego*, 453 U.S. 490 28
Mitchell v. *Cohen*, 333 U.S. 411 ..... 46, 47
NAACP v. *Button*, 371 U.S. 415 28
National Mufflers Dealers Association v. *United States*, 440 U.S. 472 49
Personnel Administrator v. *Feeney*, 442 U.S. 256 ..... 46, 47
Pipefitters Local No. 562 v. *United States*, 407 U.S. 385 31
Police Department v. *Mosley*, 408 U.S. 92 28
Rios v. *Dillman*, 499 F.2d 329 46
Roe v. *Wade*, 410 U.S. 113 21
Russell v. *Hodges*, 470 F.2d 212 46
San Antonio Independent School District v. *Rodriguez*, 411 U.S. 1 ..... 12, 18, 29
Schad v. *Borough of Mount Ephraim*, 452 U.S. 61 28
Simon v. *Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26 ..... 3, 11
Slee v. *Commissioner*, 42 F.2d 184 ..... 23, 27, 34-35
Southwest Virginia Professional Standards Review Organization, Inc. v. *United States*, 42 A.F.T.R.2d (P-H) ¶ 78-5315 44-45
Speiser v. *Randall*, 357 U.S. 513 ..... 13, 24, 25, 26, 27
St. Louis Union Trust Co. v. *United States*, 374 F.2d 427 31
Tank Truck Rentals, Inc. v. *Commissioner*, 356 U.S. 30 19
Taxation With Representation v. *United States*, 76-2 U.S. Tax Cas. (CCH) ¶ 9693, aff'd, 585 F.2d 1219, cert. denied, 441 U.S. 905 ..... 4, 6, 12, 14, 20, 27

Cases—Continued — Page

Textile Mills Corp. v. *Commissioner*, 314 U.S. 326 .. 19
Tigner v. *Texas*, 310 U.S. 141 ..... 15, 29
Trinidad v. *Sagrada Orden*, 263 U.S. 578 31
United States v. *Automobile Workers*, 352 U.S. 567 31
United States v. *Harriss*, 347 U.S. 612 .....23, 24, 27, 31
United States v. *Lee*, No. 80-767 (Feb. 23, 1982) .. 39
United States v. *Maryland Savings-Share Insurance Corp.*, 400 U.S. 4 .....12, 17, 32
United States v. *Oregon*, 366 U.S. 643 46
United States Railroad Retirement Board v. *Fritz*, 440 U.S. 166 ..... 18, 32
Virginia Professional Standard Review Foundation v. *Blumenthal*, 446 F. Supp. 1164 44
Village of Schumberg v. *Citizens for a Better Environment*, 444 U.S. 620 28
Ward v. *Commissioner*, 608 F.2d 599, cert. denied, 446 U.S. 918 11
Watson v. *Commissioner*, 27 B.T.A. 463 34
Western & Southern Life Insurance Co. v. *State Board of Equalization*, 451 U.S. 648 ..... 18, 32
Williamson v. *Lee Optical Co.*, 348 U.S. 483 .....14, 29

Constitution, statutes, rules and regulations:

United States Constitution:
First Amendment 4, 12, 20, 22, 23, 27, 31
Fifth Amendment 4, 5, 7, 9, 15
Fourteenth Amendment 21, 26
Act of Aug. 27, 1894, ch. 349, Section 32, 28 Stat. 556 ..... 15, 32
Act of Oct. 3, 1913, ch. 16, Section II(G)(a), 38 Stat. 172 .....15, 32, 33
Act of Aug. 29, 1972, Pub. L. No. 92-418, 86 Stat. 656 *et seq.*:
Section 1, 86 Stat. 656 6
Section 2, 86 Stat. 656 40
Act of Nov. 20, 1981, Pub. L. No. 97-82, 95 Stat. 1091, to be codified at 36 U.S.C. 1701 *et seq.*:
Section 8(c), 95 Stat. 1092 42
Section 15, 95 Stat. 1093 43

Constitution, statutes, rules and regulations—Continued

	Page
Anti-Injunction Act, 26 U.S.C. (& Supp. IV) 7421(a)	5
Federal Election Campaign Act of 1971, 2 U.S.C. 431 *et seq.*	22, 30
Federal Regulation of Lobbying Act, ch. 753, 60 Stat. 839, 2 U.S.C. 261 *et seq.*	23, 31
2 U.S.C. 264	31
2 U.S.C. 266(b)	31
Internal Revenue Code of 1939 (26 U.S.C. (1940 ed.)):	
Section 23(o)(2)	33, 37
Section 23(o)(3)	48
Section 23(q)(2)	37
Section 23(q)(3)	33
Section 101(6)	37
Internal Revenue Code of 1954 (26 U.S.C. (& Supp. IV)):	
Section 112	48
Section 113	48
Section 162(e)	19, 49
Section 170(a)	2
Section 170(b)(1)(A)(iv)	39
Section 170(b)(1)(B)	40
Section 170(c)	2, 14, 29, 47
Section 170(c)(1)	49
Section 170(c)(2)	*passim*
Section 170(c)(3)	5, 6, 10, 12, 41, 45
Section 170(c)(5)	49
Section 170(d)	40
Section 170(e)(3) (& Supp. IV)	41
Section 170(f)(6)	44
Section 170(h)	41
Section 217(g)	48
Section 501(a)(3)	8
Section 501(c) (& Supp. IV)	2, 7, 12, 14, 29, 48
Section 501(c)(1)	43
Section 501(c)(3)	*passim*
Section 501(c)(4)	3, 5, 6, 33, 41, 43

Constitution, statutes, rules and regulations—Continued

	Page
Section 501(c)(6)	49
Section 501(c)(7)	6, 33, 43
Section 501(c)(19)	*passim*
Section 501(h)	23, 38, 39
Section 501(h)(1)	39
Section 501(h)(2)	39
Section 501(h)(4)(D)	39
Section 501(h)(4)(E)	39
Sections 507-509	37
Section 509(a)(2)	39
Section 512(a)(4)	46
Section 692	48
Section 1034(h)	48
Section 2055(a)	2
Section 2055(a)(2)	5, 10, 16, 37
Section 2055(a)(4)	40
Section 2201	48
Section 2106(a)(2)(A)	41
Section 2522(a)	2
Section 2522(a)(2)	5, 6, 10, 37
Section 2522(a)(4)	41
Section 2522(b)	41
Section 2522(b)(2)	16, 37
Section 3401(a)(1)	48
Section 4911 (& Supp. IV)	38, 39
Section 4911(c)	39
Section 4911(d)	39
Section 4945 (& Supp. IV)	37
Section 4945(a)	40
Section 4945(d)(5)	40
Section 4945(e)	39
Section 7428 (& Supp. IV)	5, 44
Section 7428(b)(2)	44
Revenue Act of 1916, ch. 463, Section 11a, 39 Stat. 766	33
Revenue Act of 1918, ch. 18, Section 214(a)(11), 40 Stat. 1068	33, 47

Constitution, statutes, rules and regulations—Continued

	Page
Revenue Act of 1921, ch. 136, 42 Stat. 227 *et seq.*:	
Section 214(a)(11), 42 Stat. 241	15, 33
Section 231(8), 42 Stat. 253	15
Revenue Act of 1924, ch. 234, 43 Stat. 253 *et seq.*:	
Section 214(a)(10), 43 Stat. 271	15
Section 214(a)(10)(D), 43 Stat. 271	6, 33
Revenue Act of 1934, ch. 277, 48 Stat. 680:	
Section 23(o)(1), 48 Stat. 690	36
Section 23(o)(2), 48 Stat. 690	16, 17, 36, 37
Section 23(o)(3), 48 Stat. 690	36
Section 23(o)(4), 48 Stat. 690	17, 37
Section 23(o)(5), 48 Stat. 690	37
Section 101(6), 48 Stat. 700	16, 17, 36, 37
Section 101(8), 48 Stat. 700	17
Section 406, 48 Stat. 755	16, 36, 37
Section 517, 48 Stat. 760	16, 36, 37
Revenue Act of 1935, ch. 829, Section 102(c), 49 Stat. 1016	16
Revenue Act of 1936, ch. 690, Section 23(q) 49 Stat. 1661	19
Revenue Act of 1962, Pub. L. No. 87-834, Section 3(a) 76 Stat. 973	19
Tax Equity & Fiscal Responsibility Act of 1982, Pub. L. No. 97-248, Section 354, 96 Stat. 640	40, 45
Tax Reform Act of 1969, Pub. L. No. 91-172, 83 Stat. 487 *et seq.*	37
Tax Reform Act of 1976, Pub. L. No. 94-455, Section 1307, 90 Stat. 1720-1729	38, 39
Veterans Readjustment Benefits Act of 1966, 38 U.S.C. 101	46
Vocational Rehabilitation Act, 40 Stat. 617	47
War Revenue Act of 1917, ch. 63, Section 1201(2), 40 Stat. 330	15, 33
World War Veterans' Act of 1924, ch. 320, Section 12, 43 Stat. 611	36
28 U.S.C. 1252	48
36 U.S.C. 43	43

Constitution, statutes, rules and regulations—Continued	Page
36 U.S.C. 46	42
36 U.S.C. 49	43
36 U.S.C. 67d	42
36 U.S.C. 86	42
36 U.S.C. 90c	43
36 U.S.C. 90i	43
36 U.S.C. 113	43
36 U.S.C. 118	43
36 U.S.C. 1101	43
36 U.S.C. 1102	42
36 U.S.C. 1156	42
36 U.S.C. 1166	43
Rev. Rul. 55-156, 1955-1 Cum. Bull. 292	45
Rev. Rul. 61-177, 1961-2 Cum. Bull. 117	49
Tax Ct. R. 217 (rev. 1977)	45
Treas. Reg. § 33 (1918)	19
Treas. Reg. § 45, promulgated by T.D. 2831, 21 Treas. Dec. Int. Rev. 285 (1919)	34
Treasury Regulations on Foundation and Similar Excise Tax (1954 Code), 26 C.F.R.:	
Section 53.4945-2(d)	39
Section 53.4945-6(c)	40
Treasury Regulations on Income Tax (1954 Code), 26 C.F.R.:	
Section 1.501(c)(3)-1(c)	23
Section 1.501(c)(3)-1(d)(3)	34
Section 1.501(c)(4)-1(a)(2)	43
Section 1.501(c)(4)-1(a)(2)(ii)	3
Section 1.501(c)(7)-1	43
Section 1.501(c)(19)-1(c)	43
Section 1.162-20(c)(3)	49
Miscellaneous:	
51 Cong. Rec. (1913):	
p. 565	34
p. 566-567	34
55 Cong. Rec. 6728 (1917)	47
61 Cong. Rec. 7066 (1921)	48

Miscellaneous—Continued Page

78 Cong. Rec. (1934):
p. 5861 ..... 14, 35, 42
p. 5959 ..... 16, 35, 36
p. 7831 37
General Tax Reform: Hearings Before the House Comm. on Ways & Means Committee, 93d Cong., 1st Sess. (1973) 38
Geske, *Direct Lobbying Activities of Public Charities*, 26 Tax Law. 305 (1973) 38
Influencing Legislation by Public Charities: Hearings on H.R. 13500 Before the House Comm. on Ways & Means, 94th Cong., 2d Sess. (1976) 38
Legislative Activity by Certain Types of Exempt Organizations: Hearings on H.R. 13720 Before the House Comm. on Ways & Means, 92d Cong., 2d Sess. (1972) 38
H.R. Conf. Rep. No. 1385, 73d Cong., 2d Sess. (1934) 37
H.R. Rep. No. 113, 63d Cong., 2d Sess. (1913) 34
H.R. Rep. No. 1860, 75th Cong., 3d Sess. (1938) 31
H.R. Rep. No. 91-413 (Pt. 1) 91st Cong., 1st Sess. (1969) 38
H.R. Rep. No. 92-851, 92d Cong., 2d Sess. (1972) 6, 40, 46
H.R. Rep. No. 94-658, 94th Cong., 1st Sess. (1975) 45
S. Rep. No. 342, 70th Cong., 1st Sess. (1928) 34
S. Rep. No. 43, 71st Cong., 1st Sess. (1930):
Pt. 4 34
Pt. 7 34
Pt. 8 34
S. Rep. No. 558, 73d Cong., 2d Sess. (1934) 16, 36, 37
S. Rep. No. 269, 89th Cong., 1st Sess. (1965) 47
S. Rep. No. 91-552, 91st Cong., 1st Sess. (1969) 38
S. Rep. No. 92-1082, 92d Cong., 2d Sess. (1972) 6, 40, 46
S. Rep. No. 94-938 (Pt. 2), 94th Cong., 2d Sess. (1976) 39, 45

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In the Supreme Court of the United States

OCTOBER TERM, 1982

No. 81-2338

DONALD T. REGAN, SECRETARY OF THE TREASURY, ET AL., APPELLANTS

v.

TAXATION WITH REPRESENTATION OF WASHINGTON

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE APPELLANTS

OPINIONS BELOW

The opinion of the district court (J.S. App. 1a-9a) and its order granting judgment in favor of the government (J.S. App. 10a) are unofficially reported at 43 A.F.T.R.2d (P-H) ¶ 79-419. The opinion of the court of appeals en banc (J.S. App. 11a-121a) is reported at 676 F.2d 715.

JURISDICTION

This is a civil action against the Secretary of the Treasury, the Commissioner of Internal Revenue, and the United States, brought by appellee pursuant to Section 7428 of the Internal Revenue Code of 1954 (26 U.S.C. (& Supp. IV)), for a declaratory judgment with respect to appellee's qualification for tax-exempt status under

Section 501(c)(3) of the Code. The district court's jurisdiction rested on 28 U.S.C. 1346(e). A three-judge panel of the court of appeals entered an opinion and judgment on April 14, 1981 (J.S. App. 15a). On June 11, 1981, the court of appeals granted appellee's suggestion for rehearing en banc and vacated the panel's opinion and judgment (*ibid.*). The judgment of the court of appeals en banc was filed on March 26, 1982 (J.A. 58). A notice of appeal to this Court was filed by the appellants on April 23, 1982 (J.S. App. 122a). The jurisdiction of this Court rests on 28 U.S.C. 1252, which authorizes an appeal to this Court from a final judgment of a court of the United States holding an Act of Congress unconstitutional in a civil action to which the United States or any agency or officer thereof is a party. An appeal may be taken where, as here, a federal statute is held unconstitutional as applied to particular circumstances. *United States* v. *Darusmont*, 449 U.S. 292, 293 (1981); *Fleming* v. *Rhodes*, 331 U.S. 100 (1947); see *United States* v. *Christian Echoes Ministry, Inc.*, 404 U.S. 561, 563 (1972); *United States* v. *American Friends Service Committee*, 419 U.S. 7, 9 n.4 (1974). The Court noted probable jurisdiction on October 4, 1982 (J.A. 59).

STATUTES INVOLVED

The relevant provisions of Sections 170(a), 170(c), 501(c), 2055(a), and 2522(a) of the Internal Revenue Code of 1954 (26 U.S.C. (& Supp. IV)) are set forth in J.S. 123a-144a.

STATEMENT

1. The material facts are undisputed and may be summarized as follows: Appellee is a nonprofit organization incorporated under the laws of the District of Columbia (J.A. 7, 17, 27). As set forth in its application to the Internal Revenue Service for recognition as a tax-exempt organization, appellee's purpose is to represent the general public, with regard to federal tax matters in

the courts, at administrative hearings, and before Congress (J.S. App. 1a-2a, 13a; J.A. 35-46). In its application to the IRS, appellee stated that it would seek out specialists in tax matters, help them to prepare testimony for presentation at legislative hearing, and follow up their presentations with informal contacts to ensure that their message is heard (J.A. 37).

Appellee is the product of a merger between two other nonprofit corporations under common control—Taxation With Representation Fund (TWR Fund), and Taxation With Representation (TWR) (J.S. App. 2a, 13a n.1; J.A. 20-21). All three organizations had the same executive director (J.A. 17, 19). Prior to the merger, TWR Fund, which published the journal *Tax Notes* and conducted litigation involving federal tax questions, had qualified under Section 501(c)(3) of the Internal Revenue Code of 1954 (26 U.S.C.) as a tax-exempt charitable and educational organization eligible to receive tax-deductible contributions under Section 170(c)(2) of the Code (J.S. App. 2a; J.A. 14). TWR, which engaged primarily in legislative activities, including attempts to influence legislation, had received recognition as a tax-exempt social welfare organization under Section 501(c)(4) of the Code (J.S. App. 2a-3a, 13a n.1; J.A. 19, 23-24, 53.[2]

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[2] A Section 501(c)(4) social welfare organization may engage in substantial lobbying in furtherance of its exempt purpose. Unlike a Section 501(c)(3) organization, a social welfare organization is not eligible to receive tax-deductible contributions or exemption from federal unemployment or social security taxes. See *Simon* v. *Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26, 29 n.1 (1976); Treasury Regulations on Income Tax (1954 Code), 26 C.F.R. 1.501(c)(4)-1(a)(2)(ii).

Prior to the merger, the IRS had denied recognition to TWR as a Section 501(c)(3) organization because it could not meet the requirement of that provision that "no substantial part" of its activities consist of "attempting to influence legislation." Seeking to establish that it qualified as a Section 501(c)(3) organization, TWR then sued in the United States District Court for the Eastern District of Virginia for a refund of federal unemployment taxes assessed for 1973 through 1975. It alleged in that proceeding that the

During the pendency of TWR's unsuccessful prior attempt to challenge the constitutionality of the lobbying restrictions applicable to tax-exempt organizations under Section 501(c)(3) (see note 2, *supra*), appellee was formed in 1977 to absorb and carry forward the activities of TWR Fund and TWR, including TWR's lobbying activities (J.S. App. 2a, 13a-14a n.1; J.A. 16, 27, 35-45). Shortly after its incorporation, appellee applied to the Internal Revenue Service for recognition as a tax-exempt organization described in Section 501(c)(3) (J.S. App. 3a, 13a-14a; J.A. 35-45). On February 14, 1978, the Service ruled that appellee did not qualify for exemption under Section 501(c)(3) and was therefore not eligible to receive tax-deductible contributions under Section 170(c)(2) (J.A. 47-48). The sole basis for the Service's determination was appellee's refusal to comply with the express statutory requirement of Section 501(c)(3) that "no substantial part" of such organizations' activities would be "attempting[] to influence legislation". In accord with appellee's stated purpose (see J.A. 41-42),[3] the Service found that appellee's proposed activities included attempting to influence legislation, and

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lobbying limitation of Section 501(c)(3) violates its rights under the First and Fifth Amendments to the Constitution. The district court upheld the constitutionality of the statute and entered judgment for the government. *Taxation With Representation* v. *United States*, 76-2 U.S. Tax Cas. (CCH) ¶ 9693 (1976) (E.D. Va.). The court of appeals affirmed (585 F.2d 1219 (4th Cir. 1978)), and this court denied certiorari (441 U.S. 905 (1979)). The court of appeals held that TWR's right to free speech and to petition Congress were not impaired by the lobbying restrictions of Section 501(c)(3) and 170(c)(2). Further, the court rejected TWR's argument that it was denied equal protection because Sections 170(c)(3) permits veterans' organizations to lobby without restriction and still be eligible to receive tax-deductible contributions (585 F.2d at 1223-1224).

[3] In its application for tax-exempt status under Section 501(c)(3), appellee stated that it will assist in preparing testimony to be used before administrative and legislative hearings. It further stated that it "will assist skilled professionals in testifying before Congress and at administrative hearings" (J.A. 41).

that legislative advocacy might constitute a substantial part of its activities (J.S. App. 3a, 15a; J.A. 47-48). Although it appears that appellee may still qualify as a tax-exempt social welfare organization under Section 501(c)(4), that classification would not entitle appellee to receive tax-deductible contributions. See 26 U.S.C. 170(c)(2), 2055(a)(2), 2522(a)(2) (see also note 2, *supra*).

2. After exhausting its administrative remedies, appellee instituted this suit in the United States District Court for the District of Columbia under Section 7428 of the Code[4] seeking a declaratory judgment that it qualifies as an organization described in Section 501(c)(3). It raised two constitutional challenges to the lobbying restrictions of Sections 501(c)(3) and 170(c)(2). It first contended that withholding eligibility to receive tax-deductible contributions on the ground that it proposed to engage in substantial lobbying activity imposed an unconstitutional condition on the exercise of its First Amendment rights of freedom of speech and association. Second, it claimed that Congress' failure to apply the same lobbying restrictions in Section 501(c)(3) to certain other similarly situated tax exempt groups eligible to receive tax-deductible contributions, most notably veterans' organizations, denied it equal protection of the laws under the Fifth Amendment (J.A. 9-10).[5]

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[4] Section 7428 of the Code authorizes declaratory judgment actions in the Tax Court, the United States Claims Court, and the United States District Court for the District of Columbia in cases relating to the status and classification of organizations under Section 501(c)(3). The statute was enacted in response to this Court's decision in *Bob Jones University* v. *Simon*, 416 U.S. 725 (1974), holding that actions to enjoin the Commissioner's revocation of Section 501(c)(3) status were barred by the Anti-Injunction Act, 26 U.S.C. (& Supp. IV) 7421(a).

[5] Veterans' organizations are eligible for tax-exempt status and the receipt of tax-deductible contributions under Sections 501(c)(19) and 170(c)(3) of the Code. Unlike Sections 501(c)(3) and 170(c)(2), the tax provisions governing veterans' organizations contain no express restrictions as to lobbying. Prior to the enact-

The district court granted summary judgment in favor of the government (J.S. App. 1a-10a). It concluded that the tax statutes did not unconstitutionally interfere with appellee's protected speech activities. Relying on *Cammarano* v. *United States*, 358 U.S. 498 (1959), and the Fourth Circuit's decision rejecting the same claim in *Taxation With Representation* v. *United States*, 585 F.2d 1219 (1978), cert. denied, 441 U.S. 905 (1979), the district court concluded that the restriction against substantial legislative activity provided in Section 501(c)(3) did not penalize appellee for the content of its advocacy, but merely required that it conduct its legislative activities at its own, rather than at public, expense. This requirement, the court observed, served the legitimate purpose of assuring government neutrality toward the lobbying activities of charitable organizations and of preventing abuse of charitable lobbying by private interests (J.S. App. 5a-8a). Further, the court found no denial of equal protection. In its view, since the challenged tax classification neither implicated a fundamental right nor involved a suspect class, it was sufficient that the classification bore a rational relation to legitimate government objectives (*id.* at 8a-9a).

3. A divided panel of the court of appeals affirmed. Thereafter, the full court of appeals vacated the panel decision and reheard the case en banc. Upon rehearing, a divided 7-3 en banc court reversed the district court and remanded the case for further proceedings. The en banc court unanimously rejected appellee's contention that the lobbying limitation of Section 501(c)(3) violates its

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ment of Section 501(c)(19) (by Section 1, Act of Aug. 29, 1972, Pub. L. 92-418, 86 Stat. 656) veterans' organizations received exemption either as social welfare organizations (Section 501(c)(4)) or social clubs (Section 501(c)(7)). See H.R. Rep. No. 92-851, 92d Cong., 2d Sess. 2 (1972); S. Rep. No. 92-1082, 92d Cong., 2d Sess. 2 (1972). Some veterans' groups continue to receive exemption under these provisions. Veterans' groups, however, have been entitled, under Section 170(c)(3) and its predecessors, to receive tax-deductible contributions at least since 1924. See Section 214(a)(10)(D), Revenue Act of 1924, ch. 234, 43 Stat. 271.

First Amendment rights. On the authority of this Court's decision in *Cammarano* v. *United States*, *supra*, it observed that "First Amendment rights are not abridged, however, merely because the government refuses to subsidize those rights" (J.S. App. 30a). As it viewed the lobbying limitations of Section 501(c)(3), "[c]haritable organizations are simply not required to waive their First Amendment rights in order to obtain public benefits—they simply may not lobby with tax-deductible contributions" (J.S. App. 34a).

The court upheld, however, appellee's alternative contention that the lobbying limitation of Section 501(c)(3) denied it equal protection of the laws under the Fifth Amendment because those restrictions are not likewise imposed upon tax-exempt veterans' organizations under Section 501(c)(19). The court's analysis proceeded on the assumption that "a strict standard of review [is required] for situations in which the government grants tax exemptions affecting First Amendment rights on a discriminatory basis" (J.S. App. 38a). The court concluded that it had to "apply a heightened level of scrutiny to the *discriminatory* treatment of lobbying activities given by Section 501(c) to different tax-exempt groups" (*id.* at 43a; emphasis in original). In the court's view, "[t]he issue in this case therefore becomes whether the discriminatory framework of Section 501(c) serves a substantial governmental interest and whether the statute is narrowly tailored to serve that end" (*id.* at 45a). After examining the legislative history of the statute, the court concluded that no identifiable governmental interests justify the different tax treatment accorded veterans' groups and Section 501(c)(3) organizations (J.S. App. 65a-67a).[6]

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[6] Although it did not find it necessary to reach the question, the court observed that "it is possible that these discriminations could not even be upheld under a test asking whether they were 'rationally related to a legitimate governmental purpose,' for the discrimination may have been nothing more than an accidental or inadvertent result of legislative drafting" (J.S. App. 78a-79a).

Although the court held that "Section 501(c)'s disparate treatment of lobbying by particular tax-exempt groups leads to an unconstitutional violation of equal protection principles" (J.S. App. 72a), it declined to choose between striking down the lobbying restriction's application to Section 501(a)(3) organizations, or extending the restriction to Section 501(c)(19) veterans' organizations. The court stated that the former course "poses the most obvious problems" insofar as "[t]he legislative history of that limitation clearly shows a congressional determination that the public interest requires regulating the amount of tax-deductible dollars flowing to Section 501(c)(3) organizations that may be used for lobbying purposes" (J.S. App. 73a). The court acknowledged that "[e]xtending the lobbying treatment now given to veterans' organizations to all Section 501(c)(3) groups might open a Pandora's Box of woes and abuse" (*ibid.*). On the other hand, even though it believed the second course to be "the most logical and most in accordance with the judgments expressed by Congress" (*id.* at 76a), the court was reluctant to impose the lobbying restriction upon veterans' groups because none of those groups is a party to the litigation (*ibid.*). It accordingly declined to prescribe a remedy. In its view, "[e]xactly how this problem should be cured is not a matter that should be decided initially by this appellate court, especially when all directly affected parties are not before us" (*id.* at 78a).

The court therefore remanded the case to the district court "with the instruction that it cure the constitutionally invalid operation of Section 501(c) after inviting veterans' organizations to participate in framing the relief" (J.S. App. 77a). The court, however, limited the district court to choosing between two courses of action to cure the unequal treatment its found to exist—"either by restricting the tax benefits accorded veterans' organizations or by extending those benefits to Section 501(c)(3) organizations" (*id.* at 79a).

The dissenting judges would have held that it was within the power of Congress to place an anti-lobbying condition on the receipt of tax benefits by Section 501(c)(3) organizations without imposing a similar condition on veterans' organizations (J.S. App. 107a-120a). In their view, Congress was justified in subjecting Section 501(c)(3) organizations to that restriction in order to reform perceived abuses of their status (J.S. App. 95a-99a, 111a-114a). Congress was likewise justified, the dissent said, in its determination not to extend that restriction to veterans' organizations because of their fundamentally different role in society (*id.* at 110a, 114a-120a). In the dissent's view, "the important and unique public role played by veterans' groups" warranted congressional classification "as a different kind of entity deserving *tax* treatment different from that accorded the more generally described charitable organizations subject to section 501(c)(3)" (*id.* at 115a-116a; emphasis in original).

ARGUMENT

CONGRESS' DECISION TO RESTRICT THE DEGREE OF PERMISSIBLE LEGISLATIVE ACTIVITIES BY CERTAIN CATEGORIES OF ORGANIZATIONS AS A CONDITION FOR TAX-EXEMPT STATUS AND ELIGIBILITY TO RECEIVE TAX-DEDUCTIBLE CONTRIBUTIONS, AND NOT TO IMPOSE SUCH RESTRICTIONS UPON VETERANS' ORGANIZATIONS QUALIFYING FOR THESE TAX BENEFITS, DOES NOT VIOLATE THE EQUAL PROTECTION GUARANTY OF THE FIFTH AMENDMENT

INTRODUCTION AND SUMMARY

This case involves a constitutional challenge to the validity of two longstanding provisions of the Internal Revenue Code prescribing the conditions upon which various organizations can qualify for tax-exempt status and eligibility to receive tax-deductible contributions.

The judgment of the court of appeals erroneously holds unconstitutional, on grounds of equal protection, provi-

sions of the Internal Revenue Code of 1954 that express the same "sharply defined national policy" as the Treasury Regulations which this Court upheld in *Cammarano* v. *United States*, 358 U.S. 498, 508, 512-513 (1959). These provisions, which have been in continuous force for almost 50 years, deny tax-exempt status under Section 501(c)(3), and eligibility to receive tax-deductible contributions under Section 170(c)(2), to any organization, otherwise qualified as charitable, religious, scientific, or educational, where a "substantial part of the activities of * * * [such organization] is carrying on propaganda, or otherwise attempting, to influence legislation * * *." 26 U.S.C. 501(c)(3); see 26 U.S.C. 170(c)(2), 2055(a)(2), 2522(a)(2).

1. a. The statute does not impose this restriction against influencing legislation on veterans' organizations qualifying for the same federal tax benefits under Sections 170(c)(3) and 501(c)(19). Appellee is an organization formed for the purpose of attempting to influence tax legislation. As a result of its proposed legislative activities, the Internal Revenue Service denied appellee tax-exempt status under Section 501(c)(3) and eligibility to receive tax-deductible contributions under Section 170(c)(2).

The court of appeals ruled that the absence of a lobbying restriction upon tax-exempt veterans' groups under Section 501(c)(19) "leads to an unconstitutional violation of equal protection principles" (J.S. App. 72a). Faced with the choice of eliminating the lobbying restriction for all Section 501(c)(3) organizations, as appellee urges, or imposing it upon veterans' organizations which the court believed to be "the most logical" course (J.S. App. 76a), the court remanded the case to the district court to rewrite the statute under either of these alternatives, after inviting veterans' groups to participate in framing the relief.

But the court of appeals' imposition of the duties and responsibilities of a legislative committee upon a federal

district court cannot be reconciled with the separation of powers that is at the heart of our constitutional system. What is more, both alternative modes of relief envisioned by the court are seriously defective. It hardly requires elaboration that the allegedly "logical" imposition of the lobbying restrictions upon the veterans' organizations would not satisfy appellee's desire for tax-exempt status—the very object of this litigation. Cf. *Simon* v. *Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26 (1976). In these circumstances, it is highly questionable whether a court can expand the scope of a lawsuit directed toward achieving specific relief and embark upon a remedial course, neither requested nor desired by appellee, that would impose restrictions upon approximately 35,000 veterans' organizations which are not parties to the litigation. See *Kirk* v. *Commissioner*, 425 F.2d 492, 495 (D.C. Cir.), cert. denied, 400 U.S. 853 (1970); *Ward* v. *Commissioner*, 608 F.2d 599, 601 (5th Cir. 1979), cert. denied, 446 U.S. 918 (1980).

Nor is the alternative remedy—the elimination of the lobbying restriction upon Section 501(c)(3) organizations—any more acceptable. As the court of appeals observed (J.S. App. 73a-74a), an extension to Section 501(c)(3) organizations of the right now given to veterans' organizations to lobby with tax-deductible contributions would invite wholesale public subvention of partisan interests in derogation of the legitimate expectations of Congress. Moreover, the decision below holding these limitations unconstitutional, and the standard of strict scrutiny applied, have no support in the decisions of this Court construing the equal protection guarantees of the Fifth and Fourteenth Amendments. This Court has made it clear that legislatures possess the widest latitude to draw distinctions which, in their judgment, establish a reasonable system of taxation, and that a classification rationally related to the achievement of a legitimate government objective will not be set aside unless it is palpably arbitrary or directly infringes a fundamental right.

United States v. *Maryland Savings-Share Insurance Corp.*, 400 U.S. 4 (1970); *San Antonio Independent School District* v. *Rodriguez*, 411 U.S. 1, 17, 40-41 (1973).

There is no invidious discrimination in this case, nor does the lobbying limitation infringe any right protected by the Constitution. That is the teaching of *Cammarano* v. *United States*, *supra*. There, this Court unanimously rejected the claim that a denial of income tax deductions to businesses for sums expended to influence legislation presented a substantial constitutional question under the First Amendment. As the Court there explained, "[p]etitioners are not being denied a tax deduction because they engage in constitutionally protected activities, but are simply being required to pay for those activities entirely out of their own pockets, as everyone else engaging in similar activities is required to do under the provisions of the Internal Revenue Code." 358 U.S. at 513. On the authority of *Cammarano*, the lower courts have ruled uniformly that the lobbying limitations of Sections 501(c)(3) and 170(c)(2) impair no right to speech protected by the First Amendment. See *Taxation With Representation* v. *United States*, 585 F.2d 1219, 1223-1224 (4th Cir. 1978), cert. denied, 441 U.S. 905 (1979).

b. Acknowledging the force of this precedent, the court below ruled that the lobbying limitations do not abridge appellee's First Amendment rights. The court held, however, that the lobbying limitations violate appellee's Fifth Amendment right to equal protection because they are not imposed on other organizations—most notably veterans' organizations—that qualify for tax-exempt status and eligibility for tax-deductible contributions under Sections 501(c) and 170(c)(3). While these other organizations include cemetery companies operated for the benefit of their members, as well as veterans' organizations, appellee's equal protection claim and the decision below focuses upon the tax benefits accorded vet-

erans' organizations under Sections 170(c)(3) and 501(c)(19).

But the court of appeals' conclusion conflicts with its own recognition that this case does not involve a governmental restriction of First Amendment rights, but only "unequal levels of government subsidy" (J.S. App. 39a). Indeed, the decisions of this Court recognize this very distinction. As the Court stated in *Maher* v. *Roe*, 432 U.S. 464, 475 (1977) (footnote omitted), "[t]here is a basic difference between direct state interference with a protected activity and state encouragement of an alternative activity consonant with legislative policy." Accord, *Harris* v. *McCrae*, 448 U.S. 297, 315-318, 321-322 (1980); see *Buckley* v. *Valeo*, 424 U.S. 1, 93-108 (1976). Just as this Court held in *Buckley* that Congress could grant public funding only to Presidential candidates of major parties without triggering exacting scrutiny of its determination, Congress likewise has broad authority here to further the interests of veterans by permitting their organizations to lobby on matters of importance to them with tax-deductible funds that are not available on identical terms to all other categories of exempt organizations.

c. None of the cases relied on by the court of appeals supports its conclusion that the conditions imposed by the government on the granting of a tax exemption to appellee must have more than a rational basis. In *Speiser* v. *Randall*, 357 U.S. 513 (1958), the vice of the loyalty oath struck down by this Court as violative of procedural due process was that it chilled permissible speech by requiring that applicants for California's property tax exemption come forward with evidence that they had not engaged in criminal speech. The lobbying limitation imposed on appellee bears no resemblance to that loyalty oath. It does not require appellee to assume the burden of proving an absence of criminal speech. It is "plainly not 'aimed at the suppression of dangerous ideas'" (*Cammarano* v. *United States*, *supra*, 358 U.S. at 513, quoting *Speiser* v. *Randall*, *supra*, 357 U.S. at 519). Thus, it is not subject, as was the loyalty oath in *Speiser*, to the

strict scrutiny applicable to provisions that abridge a fundamental right.

2. Accordingly, the proper inquiry in this case is whether the challenged classifications of Sections 501(c) and 170(c) bear a rational relation to the objectives of the exempt organization provisions. Those statutes meet this constitutional standard.

This Court many times has sustained distinctions in laws that address "'the phase of the problem which seems most acute to the legislative mind.'" *Buckley* v. *Valeo*, 424 U.S. 1, 105 (1976), quoting *Williamson* v. *Lee Optical Co.*, 348 U.S. 483, 489 (1955); see *Katzenbach* v. *Morgan*, 384 U.S. 641, 657 (1966). As its terms and history show, the lobbying limitation is precisely such a remedial measure. It addresses what Congress has perceived to be a serious abuse of the exempt organization provisions—the use of tax-exempt and tax-deductible funds by Section 501(c)(3) organizations "to advance the personal interests of the giver" (78 Cong. Rec. 5861 (1934)). During the floor debate preceding its enactment, the view was expressed that the same limitation should apply to all organizations otherwise eligible to receive tax-deductible contributions, including "war organizations" (*ibid.*). But Congress enacted, and has since maintained in continuous effect, a limitation applicable by its terms only to organizations classified as charitable, and not to veterans' organizations.

Furthermore, "the unique and compelling societal and governmental goals served by * * * [veterans'] organizations provide ample justification for the special tax treatment extended to them by the Congress." *Taxation With Representation* v. *United States*, *supra*, 585 F.2d at 1224. The nation owes to veterans a special debt for enduring the hazards of war and disruption of civilian pursuits associated with service in the Armed Forces. The legislative authority to provide benefits and preferences for veterans has been sustained repeatedly against constitutional attack. See *Johnson* v. *Robison*, 415 U.S. 361, 374-386 (1974). Nothing in the equal protection guaranty

requires that charitable organizations be placed on a par with veterans' organizations under the Internal Revenue Code. Equal protection does not require that "things which are different in fact * * * be treated in law as though they were the same." *Tigner* v. *Texas*, 310 U.S. 141, 147 (1940). In the exercise of its broad power to draw distinctions in the area of taxation, Congress has ample authority to recognize the debt owed veterans by allowing their organizations to conduct substantial lobbying with tax-deductible funds in furtherance of their exempt purpose. The Fifth Amendment does not demand the same subvention to all other tax-exempt groups that engage in substantial partisan activities.

A. Congress' Use Of Different Standards With Respect To The Degree Of Permissible Legislative Activities By Veterans' Organizations And Other Categories Of Tax-Exempt Organizations Is Not Subject To Strict Judicial Scrutiny But Must Be Upheld If Supported By A Rational Basis

1. *Congress has broad discretion to draw distinctions in framing revenue statutes which in its judgment produce a reasonable system of taxation*

a. Federal tax exemptions for religious, charitable or educational organizations have their roots in the Income Tax Act of 1894 (Section 32, Act of Aug. 27, 1894, ch. 349, 28 Stat. 556) and a provision for exemption was included in the Income Tax Act of 1913 (Section II(G)(a), Act of Oct. 3, 1913, ch. 16, 38 Stat. 172). A tax deduction for contributions to charitable organizations was first authorized in the War Revenue Act of 1917, ch. 63, Section 1201(2), 40 Stat. 330. American Legion posts were specifically accorded status as eligible donees of tax-deductible contributions in 1921 (Section 214(a)(11), Revenue Act of 1921, ch. 136, 42 Stat. 241); this status was extended to veterans' organizations generally in 1924 (Section 214(a)(10), Revenue Act of 1924, ch. 234, 43 Stat. 271). As early as 1921, veterans' organizations were recognized as tax-exempt social welfare organizations (Revenue Act of 1921, Section 231(8) (42 Stat. 253)).

Prior to 1934, the revenue laws contained no express limitations on the lobbying activities of exempt organizations. In 1934, Congress amended the revenue laws for the express purpose of denying tax-exempt status and deductibility of contributions to corporations, otherwise qualified as "religious, charitable * * * or educational," which engage in substantial activities to promote or defeat legislation. Revenue Act of 1934, ch. 277, Sections 23(o)(2) and 101(6), 48 Stat. 690 and 700. The following year, when Congress further amended the law to permit corporations to deduct certain contributions not qualifying as "ordinary and necessary" business expenses, an identical limitation was imposed. Revenue Act of 1935, ch. 829, Section 102(c), 49 Stat. 1016. These limitations have remained in continuous force for almost 50 years. Carried forward unchanged into the Internal Revenue Code of 1939, and now contained in Sections 501(c)(3) and 170(c)(2) of the Internal Revenue Code of 1954, they provide that any organization otherwise described in Section 501(c)(3) shall be ineligible for exemption under that provision, and ineligible to receive tax-deductible contributions under Section 170(c)(2), where a "substantial part of the activities of * * * [such organization] is carrying on propaganda, or otherwise attempting, to influence legislation * * *."[7]

When Congress amended the tax statutes in 1934 to impose the lobbying limitation, it did not make that

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[7] Section 170(c)(2) governs the deductibility for income tax purposes of contributions to charitable organzations described in Section 501(c)(3). It derives from Section 23(o)(2) of the Revenue Act of 1934, enacted to deny income tax deductions for gifts to "certain organizations which are receiving contributions in order to influence legislation and carry on propaganda" (78 Cong. Rec. 5959 (1934)). Cognate provisions added in 1934 "to carry out the policy adopted in section 23(o)(2)" (S. Rep. No. 558, 73d Cong., 2d Sess. 46, 52 (1934)), and carried forward into Sections 2055(a)(2) and 2522(a)(2) and (b)(2) of the 1954 Code, deny deductions for estate and gift tax purposes for gifts to organizations "disqualified for tax exemption under section 501(c)(3) by reason of attempting to influence legislation * * *." See Revenue Act of 1934, ch. 277, Sections 406 and 517, 48 Stat. 755 and 760.

limitation applicable to all tax-exempt organizations. On the contrary, the limitation was made applicable solely to the religious, charitable, and educational organizations exempt from tax under Section 101(6) of the Revenue Act of 1934 and eligible to receive tax-deductible contributions under Section 23(o)(2). Thus, at the very inception of the lobbying limitation, it was not imposed upon veterans' organizations exempt from tax under Section 101(8) of that Act (48 Stat. 700), and eligible to receive tax-deductible contributions under Section 23(o)(4). And this exemption of veterans' organizations from the lobbying limitation applicable to charitable organizations has remained continuously in effect.

b. Contrary to the court of appeals' determination, the classifications drawn by Congress with respect to the imposition of the lobbying limitation are not subject to strict judicial scrutiny. This Court's decisions long have recognized the broadest authority in Congress "to select some and omit other possible subjects of taxation" (*Flint* v. *Stone Tracy Co.*, 220 U.S. 107, 158 (1911)), and to "singl[e] out * * * one particular class for taxation or exemption" (*Carmichael* v. *Southern Coal & Coke Co.*, 301 U.S. 495, 509 (1937)). Its decisions establish that a legislature has broad latitude to draw lines which, in the legislature's judgment, produce a reasonable system of taxation, and that they will not be set aside if any rational basis for them is demonstrated to or perceived by the courts. For example, the Court has upheld the constitutionality of "grandfather clauses" in federal tax statutes (*United States* v. *Maryland Savings-Share Insurance Corp.*, 400 U.S. 4, 6-7 (1970)) (construing Section 501(c)(14) of the Internal Revenue Code of 1954); state tax distinctions between in-state and out-of-state bank deposits (*Madden* v. *Kentucky*, 309 U.S. 83, 87-88 1940)); and state tax distinctions between corporations and individuals (*Lehnhausen* v. *Lake Shore Auto Parts Co.*, 410 U.S. 356, 359 (1973)); state tax exclusions for businesses employing less than a prescribed number of persons (*Carmichael* v. *Southern Coal & Coke Co.*, *supra*,

301 U.S. at 509). See also *San Antonio Independent School District* v. *Rodriguez*, 411 U.S. 1, 17, 40-41 (1973); *United States Railroad Retirement Board* v. *Fritz*, 449 U.S. 166, 179 (1980).

The distinctions drawn by Congress in framing revenue statutes affect the rights of many individuals and organizations, but it does not follow that a tax otherwise within the area of congressional power is to be subjected to strict scrutiny merely because it has an indirect impact upon the exercise of a constitutionally recognized right. See *Ensminger* v. *Commissioner*, 610 F.2d 189, 192-194 (4th Cir. 1979); *Kellems* v. *Commissioner*, 58 T.C. 556, 558-560 (1972), aff'd per curiam, 474 F.2d 1399 (2d Cir.), cert. denied, 414 U.S. 831 (1973). As the district court here recognized (J.S. App. 9a), in the absence of an explicit demonstration that a tax classification is a "hostile and oppressive discrimination" (*Madden* v. *Kentucky*, 309 U.S. 83, 87-88 (1940)), or a "calculated device in the guise of a tax" (*Grosjean* v. *American Press Co.*, 297 U.S. 233, 250 (1936)), or that it otherwise infringes directly a fundamental right protected by the Constitution, this Court has held that all that the Equal Protection Clause requires is that the taxing statute bear a rational relation to the accomplishment of a legitimate government purpose. Thus, a statute that does not impinge upon a fundamental right or operate to the disadvantage of a suspect class merely must "be examined to determine whether it rationally furthers some legitimate, articulated state purpose and therefore does not constitute an invidious discrimination." *San Antonio Independent School District* v. *Rodriguez*, *supra*, 411 U.S. at 17. Accord: *Lehnhausen* v. *Lake Shore Auto Parts Co.*, 410 U.S. 356, 359 (1973); *Kahn* v. *Shevin*, 416 U.S. 351, 355-356 (1974); *Western & Southern Life Insurance Co.* v. *Board of Equalization*, 451 U.S. 648, 656-658, 666-668 (1981); see *Maher* v. *Roe*, 432 U.S. 464, 470 (1977); *Harris* v. *McCrae*, 448 U.S. 297, 322 (1980).

2. *The distinction in the tax-exempt provisions between charitable and other organizations (Section 501(c)(3)) and veterans' organizations (Section 501(c)(19)) is not invidious and does not abridge any of appellee's rights under the Constitution*

a. There is no invidious discrimination in this case, nor does the lobbying limitation infringe any of appellee's rights under the Constitution. This is the teaching of *Cammarano* v. *United States*, 358 U.S. 498 (1959). There, this Court unanimously sustained longstanding Treasury Regulations which expressed, as the Court twice observed (358 U.S. at 508, 512), the same "sharply defined policy" as the limitations on lobbying contained in Sections 501(c)(3) and 170(c)(2) of the Internal Revenue Code of 1954.[8] The Court ruled in *Cammarano*

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[8] The regulation in question denied a deduction for business expenses, otherwise qualifying as "ordinary and necessary," if incurred for "lobbying purposes, the promotion or defeat of legislation, the exploitation of propaganda * * *." Promulgated as Art. 143, Treas. Reg. § 33 (1918), it appeared continuously thereafter, without substantial change, until the enactment of Section 162(e) of the 1954 Code, by Section 3(a), Revenue Act of 1962, Pub. L. No. 87-834, 76 Stat. 973. Section 162(e) permits a taxpayer to deduct, as "ordinary and necessary," certain business expenses incurred "in direct connection with" legislative matters "of direct interest to the taxpayer * * *." The amendment confirms that expenses "to influence the general public * * * with respect to legislative matters" are not deductible as trade or business expenses.

This Court earlier sustained the same regulation as consistent with congressional and judicial policy. *Textile Mills Securities Corp.* v. *Commissioner*, 314 U.S. 326, 336-339 (1941). It there noted that the Revenue Act of 1936, ch. 690, Section 23(q), 49 Stat. 1661, specifically provided for the deduction of certain contributions by corporations to specified donees " 'no substantial part of the activities of which is carrying on propaganda, or otherwise attempting, to influence legislation' " (314 U.S. at 338 n.18). "The general policy being clear", it concluded, "it is not for us to say that the line was too strictly drawn" (314 U.S. at 339). See *Cammarano* v. *United States*, *supra*, 358 U.S. at 503-504, 508; *Commissioner* v. *Sullivan*, 356 U.S. 27, 28 (1958); *Tank Truck Rentals, Inc.* v. *Commisioner*, 356 U.S. 30, 33-34 (1958).

that the regulation, "adopted by the Commissioner in the early days of federal income tax legislation, in continuous existence since that time, and consistently construed by the courts on many occasions to deny deductions," had acquired the force of law (358 U.S. at 510-511). Moreover, it rejected the argument that enforcement of the regulation to deny deductions for sums expended to influence legislation presented a substantial constitutional issue under the First Amendment. As the Court explained, "[p]etitioners are not being denied a tax deduction because they engage in constitutionally protected activities, but are simply being required to pay for those activities entirely out of their own pockets, as everyone else engaging in similar activities is required to do under the provisions of the Internal Revenue Code." 358 U.S. at 513.

On the authority of *Cammarano*, the lower courts have ruled uniformly that the lobbying limitations of Sections 501(c)(3) and 170(c)(2) impair no right protected by the First Amendment. *Taxation With Representation* v. *United States*, 585 F.2d 1219, 1223-1224 (4th Cir. 1978), cert. denied, 441 U.S. 905 (1979); *Christian Echoes National Ministry, Inc.* v. *United States*, 470 F.2d 849, 856-857 (10th Cir. 1972), cert. denied, 414 U.S. 864 (1973); *Haswell* v. *United States*, 500 F.2d 1133, 1147-1149 (Ct. Cl. 1974), cert. denied, 419 U.S. 1107 (1975); see *"Americans United" Inc.* v. *Walters*, 477 F.2d 1169, 1181-1182 (D.C. Cir. 1973), rev'd on jurisdictional grounds, 416 U.S. 752 (1974).

b. The court of appeals below acknowledged the force of this precedent. As it observed, "First Amendment rights are not abridged * * * merely because the government refuses to subsidize those rights" (J.S. App. 30a; see *id.* at 34a-35a). See *Cammarano* v. *United States*, *supra*, 358 U.S. at 515 (Douglas, J., concurring). It found that "charitable organizations are governed by no conditions other than those upheld in *Cammarano*" (J.S. App. 35a). The court concluded, however, that "this case is not like *Cammarano*, in which the indirect burdens on First Amendment expression fell equally on

all. Only a heightened scrutiny test fully accords with decisions in other cases" (J.S. App. 40a).

But that conclusion conflicts with the court of appeals' own recognition that this case does not involve any governmental restriction of First Amendment rights, but only "unequal levels of government subsidy" (J.S. App. 39a). Indeed, the decision of this Court construing the equal protection guarantees recognize this very distinction. As this Court observed in *Maher* v. *Roe*, 432 U.S. 464, 475-476 (1977) (footnote omitted):

> There is a basic difference between direct state interference with a protected activity and state encouragement of an alternative activity consonant with legislative policy. Constitutional concerns are greatest when the State attempts to impose its will by force of law; the State's power to encourage actions deemed to be in the public interest is necessarily far broader.

At issue in *Maher* was a Connecticut welfare regulation under which Medicaid recipients received payments for abortions certified as medically necessary and for other medical services incident to pregnancy and childbirth, but not for nontherapeutic abortions. The district court held that the regulation violated the equal protection clause of the Fourteenth Amendment because the unequal subsidization impinged on the right to abortion recognized in *Roe* v. *Wade*, 410 U.S. 113 (1973). But this Court ruled that the regulation did not infringe that right and sustained the regulation as a rational means to a legitimate government purpose (432 U.S. at 470-471, 473-480). As the Court pointed out, "[t]he State * * * has imposed no restriction on access to abortions that was not already there. The indigency that may make it difficult—and in some cases, perhaps impossible—for some women to have abortions is neither created nor in any way affected by the Connecticut regulation" (*id.* at 474). Thus, the Court concluded that even though the Connecticut regulation made childbirth a more attractive

alternative by determining to fund only therapeutic abortions, the regulation was valid because it imposed no governmental restriction on access to abortions.[9] Accord, *Harris* v. *McCrae*, 448 U.S. 297, 315-318, 321-322 (1980).

The Court drew the same distinction in *Buckley* v. *Valeo*, 424 U.S. 1, 93-108 (1976). There, the Court upheld as consistent with the guarantees of free speech and equal protection, certain provisions of the Federal Election Campaign Act of 1971, 2 U.S.C. 431 *et seq.* Those provisions grant public funds, through Subtitle H of the Internal Revenue Code of 1954, and by other means, to Presidential candidates of major, but not of minor, parties. The Court found that they were designed to further, not abridge, First Amendment values and to curb the improper influence of private contributions on elections (424 U.S. at 92-93 & n.127, 96). The Court rejected an analogy to cases in which it had subjected to "exacting scrutiny" laws that placed "direct burdens * * * on a candidate's access" to a ballot. *Id.* at 93-94. In terms applicable with equal force to appellee's claim that it is "prevented from speaking out freely" (J.A. 25), the Court stated (424 U.S. at 94-95) (footnote omitted):

> In contrast, the denial of public financing to some Presidential candidates is not restrictive of voters' rights and less restrictive of candidates'. Subtitle H [of the Internal Revenue Code of 1954] does not prevent any candidate from getting on the ballot or any

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[9] The Court amplified this point in reaching a similar conclusion in *Harris* v. *McCrae*, 448 U.S. 297, 316 (1980). It there stated:

> [I]t simply does not follow that a woman's freedom of choice carries with it a constitutional entitlement to the financial resources to avail herself of the full range of protected choices. The reason why was explained in *Maher*: although government may not place obstacles in the path of a woman's exercise of her freedom of choice, it need not remove those not of its own creation.

voter from casting a vote for the candidate of his choice; the inability, if any, of minor-party candidates to wage effective campaigns will derive not from lack of public funding but from their inability to raise private contributions.

The foregoing decisions in *Buckley*, *Harris*, *Maher* and *Cammarano* establish the mode of constitutional analysis appropriate to this case.[10] Just as Congress could de-

[10] Appellee argued below that *Cammarano* is distinguishable because it upheld the denial of deductibility only for funds used specifically for lobbying whereas the lobbying limitations of Sections 501(c)(3) and 170(c)(2) disqualify appellee from holding charitable tax status and from receiving any tax-deductible contributions (J.S. App. 74a n.52). Cf. *Harris* v. *McCrae*, *supra*, 448 U.S. at 317 n.19; *Maher* v. *Roe*, *supra*, 432 U.S. at 474-475 n.8; *Cammarano* v. *United States*, *supra*, 358 U.S. at 515 (Douglas, J., concurring).

But these limitations are no broader than necessary to accomplish the underlying congressional purpose and do not "penalize" appellee for the content of its advocacy. Cf. 26 U.S.C. 501(h) and note 20, *infra*. As the Court pointed out in *Cammarano*, the lobbying limitations now embodied in Sections 501(c)(3) and 170(c)(2) "made explicit the conclusion * * * that 'political agitation as such is outside the statute, however, innocent the aim * * *.'" 358 U.S. at 512, quoting *Slee* v. *Commissioner*, 42 F.2d 184, 185 (2d Cir. 1930). The limitations on substantial lobbying correctly implement both that "sharply defined policy" (*ibid.*), and the settled principle that the presence of a single nonexempt purpose, if substantial in nature, suffices to disqualify an organization from holding charitable tax status. *Better Business Bureau* v. *United States*, 326 U.S. 279, 283 (1945); Treasury Regulations on Income Tax (1954 Code), 26 C.F.R. 1.501(c)(3)-1(c).

Indeed, an analogous limitation appears in the Federal Regulation of Lobbying Act, ch. 753, 60 Stat. 839, 2 U.S.C. 261 *et seq.*, which this Court upheld against a First Amendment challenge in *United States* v. *Harriss*, 347 U.S. 612 (1954). That Act covers contributions made or solicited for "the principal purpose" of influencing the passage or defeat of congressional legislation. This Court construed the Act to cover any contribution "which in substantial part is to be used to influence legislation" (*id.* at 622). Citing the predecessor of Section 170(c)(2) of the 1954 Code, it noted that "[s]uch a criterion is not novel in federal law." 347 U.S. at 622 n.13. As the Court explained, "[i]f it were otherwise—if an organization, for example, were exempted [from coverage under the Act] because

termine to grant public funding to a particular class of candidates without triggering strict and exacting scrutiny of its determination, surely Congress has at least as much, and possibly more, authority to permit veterans' organizations to lobby on matters of importance to them with tax-deductible funds that are not available on identical terms to all other types of exempt organizations. See *Haswell* v. *United States*, *supra*, 500 F.2d at 1150. The benefits thus granted to certain organizations and withheld from others are a matter of legislative grace, not of constitutional entitlement. The unquestioned right to free speech and petition and to equal protection does not carry with it a guarantee of any person's, or any corporation's, qualification for tax-exempt status. See *Commissioner* v. *Sullivan*, 356 U.S. 27, 28 (1958); *Harris* v. *McCrae*, *supra*, 448 U.S. at 316-317 & n.19; *Cammarano* v. *United States*, *supra*, 358 U.S. at 515 (Douglas, J., concurring). Thus, the question in this case is not whether Congress has denied or infringed a fundamental right to lobby but rather whether Congress violated the Constitution by not extending to charitable organizations the same treatment extended to veterans' organizations. Here, as in *Buckley*, *Harris*, *Maher*, and *Cammarano*, Congress need only show that its decision to encourage a particular activity or interest is a rational means to a legitimate governmental end.

c. *Speiser* v. *Randall*, 357 U.S. 513 (1958), upon which the court of appeals principally relied (J.S. App. 36a-39a), is inapposite. Unlike the loyalty oath that was a condition of property tax exemption in *Speiser*, Section 501(c)(3) is "plainly not 'aimed at the suppression of dangerous ideas.'" *Cammarano* v. *United States*, *supra*, 358 U.S. at 513, quoting *Speiser* v. *Randall*, *supra*, 357 U.S. at 519. Although the court of appeals recognized that *Speiser* could be read as turning on that distinction,

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lobbying was only one of its main activities—the Act would in large measure be reduced to a mere exhortation against abuse of the legislative process." *Id.* at 622-623.

it believed that such an "interpretation conflicts with the approach taken by the Court" (J.S. App. 36a-37a n.24). It accordingly concluded that this case could be assimilated to the situation in *Speiser*, and that *Cammarano* and *Speiser* together "requir[e] a strict standard of review for situations in which the government grants tax exemptions affecting First Amendment rights on a discriminatory basis" (J.S. App. 36a-40a).

But the reading of *Speiser* rejected by the court below was precisely the one adopted by the unanimous Court in *Cammarano*. There, this Court distinguished *Speiser* as involving a statute "'aimed at the suppression of dangerous ideas.'" 358 U.S. at 513, quoting 357 U.S. at 519.[11] *Speiser* has no more relevance here. Neither it nor *Cammarano* authorizes, much less requires, the strict scrutiny standard of review employed by the court of appeals.

What is more, the court's view that *Speiser* turned on "discriminatory" treatment of separate categories of tax-

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[11] The government argued to this Court in *Cammarano* (Br. for the Resp. at 40-41 (No. 29, 1958 Term); emphasis added):

> Only recently this Court pointed out (*Commissioner* v. *Sullivan*, 356 U.S. 27, 28) that "Deductions are a matter of grace and Congress can, of course, disallow them as it chooses." This statement, no doubt, is subject to the qualification that a grossly unreasonable classification of deductions will exceed constitutional limitations, particularly if the classification is "aimed at the suppression of dangerous ideas." See *Speiser* v. *Randall*, 357 U.S. 513, 519. But that clearly is not this case. *The regulation treats all legislation alike, regardless of the political party or pressure group; it does not single out any particular kind of legislation as good or bad, innocuous or dangerous, orthodox or radical.* Indeed, it is taxpayers themselves who would have the taxing authorities make a qualitative evaluation of different types of speech; they argue that the regulation does not apply to expenditures which are "completely free of taint from law or morals" (Br. 20, No. 50) or are "open, aboveboard, legitimate" (Br. 32, No. 29), and even contend that the regulation is unconstitutional if otherwise construed (Br. 18, 20 No. 50).

payers (J.S. App. 38a-39a) finds no support in this Court's opinion in that case. *Speiser* involved an amendment to California's constitution that required each applicant for exemption from California's property tax to swear, as a condition of the exemption, that he did not "'advocate the overthrow of the Government * * * by force or violence or other unlawful means'" (357 U.S. at 515). As construed by the Supreme Court of California, that amendment operated to deny an exemption only to an applicant who engaged in speech that might be criminally punished (*id.* at 519). Thus, as this Court viewed the matter, the vice of the oath was that it chilled permissible speech by requiring that an applicant seeking exemption come forth with evidence that he had not engaged in criminal speech. *Id.* at 526. As the Court explained, "[t]he man who knows that he must bring forth proof and persuade another of the lawfulness of his conduct necessarily must steer far wider of the unlawful zone than if the State must bear these burdens" (*ibid.*). The Court therefore struck down the oath as violative of the procedural safeguards of the due process clause of the Fourteenth Amendment (357 U.S. at 517, 520-521, 523, 526-529).[12]

Thus, the lobbying limitation imposed on appellee bears no resemblance to the loyalty oath requirement struck down in *Speiser*. Sections 501(c)(3) and 170(c)(2) do not infringe protected activity. They do not require appellee to assume the burden of proving an absence of criminal speech. And as this Court subsequently confirmed, they are "plainly not 'aimed at the suppression of dangerous ideas.'" *Cammarano* v. *United States*, *supra*, 358 U.S. at 513, quoting *Speiser* v. *Randall*, *supra*,

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[12] Indeed, the Court pointed out that its disposition of that case on grounds of procedural due process made it unnecessary to consider whether, as claimed, equal protection was denied to those seeking property tax exemption because the loyalty oath was "required only as to property-tax and corporation-income-tax exemptions, but not as to the householder's personal-income-tax" (357 U.S. at 517-518 n.3).

357 U.S. at 519. Instead, as the district court here pointed out (J.S. App. 8a), the lobbying limitation serves the legitimate government purpose of assuring the Treasury's neutrality toward the lobbying activities of charitable organizations, of preventing abuses of charitable lobbying by private interests, and of preserving a balance between the lobbying activities of charitable organizations and those of other organizations and individuals. Cf. *United States* v. *Harriss*, 347 U.S. 612, 625-626 (1954). The limitation upon lobbying activities is neutral as to the points of view appellee would espouse. It therefore does not suffer the constitutional infirmity of the loyalty oath in *Speiser*. See *Taxation With Representation* v. *United States*, 585 F.2d 1219, 1223-1224 (4th Cir. 1978), cert. denied, 441 U.S. 905 (1979); *Haswell* v. *United States*, 500 F.2d 1133, 1142, 1150 (Ct. Cl. 1974), cert. denied, 419 U.S. 1107 (1975); *Kuper* v. *Commissioner*, 332 F.2d 562, 563 (3d Cir.), cert. denied, 379 U.S. 920 (1964). As Judge Learned Hand concluded with respect to a similar restriction against the deduction of lobbying expenses in a predecessor of Section 170(c)(2), "[p]olitical agitation as such is outside the statute, *however innocent the aim* * * *. Controversies of that sort must be conducted without public subvention; the Treasury stands aside from them." *Slee* v. *Commissioner*, 42 F.2d 184, 185 (2d Cir. 1929) (emphasis supplied).[13]

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[13] The other cases upon which the court of appeals relied do not cast doubt upon our submission that the tax statutes at issue here need only meet a rational basis standard. Those cases serve only to bear out that "[c]onstitutional concerns are greatest when the State attempts to impose its will by force of law" (*Maher* v. *Roe*, *supra*, 432 U.S. at 476). For example, in *First National Bank* v. *Bellotti*, 435 U.S. 765 (1978), this Court struck down a Massachusetts statute that made it a criminal act, punishable by fine and by imprisonment of the corporation's officers, for a bank or other business corporation to make an expenditure to influence the vote on any matter that did not affect materially the business of the corporation. *Id.* at 768-769 n.2. The Court found an infringement of the First Amendment, necessitating strict scrutiny, "where, as here, the legislature's *suppression of speech* suggests an attempt

In sum, the statutory classification in the revenue statutes challenged by appellee is not subject to the strict scrutiny of statutory distinctions that operate to deny a fundamental right to a particular class. Nor is it based (and appellee has never contended otherwise) on any "suspect criterion." Consequently, it is not subject to strict judicial scrutiny, as the court below erroneously held, but rather only must "be examined to determine whether it

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to give one side of a debatable public question an advantage" (435 U.S. at 784-786; emphasis added).

Similarly, in *Carey* v. *Brown*, 447 U.S. 455 (1980), the court considered an Illinois ordinance that made it unlawful, and punishable by fine and imprisonment, to picket a residence or dwelling, but excepted from that prohibition peaceful picketing of a place of employment involved in a labor dispute (*id.* at 457 & n.1). The Court observed that "under the guise of preserving residential privacy, Illinois has *flatly prohibited* all nonlabor picketing even though it permits labor picketing that is equally likely to intrude on the tranquility of the home." *Id.* at 462 (emphasis added). Accord, *Police Department* v. *Mosley*, 408 U.S. 92 (1972).

Thus, all of these cases involved an absolute prohibition imposed directly on protected activities. Here, by contrast, the revenue statutes appellee challenge do not prohibit it from engaging in lobbying activities. Those provisions simply grant appellee tax-exempt status on the condition that "no substantial part" of its activities be devoted to influencing legislation.

To the same effect are *Metromedia, Inc.* v. *City of San Diego*, 453 U.S. 490 (1981) (ordinance imposing prohibitions on the erection of outdoor advertising displays); *Schad* v. *Borough of Mount Ephraim*, 452 U.S. 61 (1981) (ordinance prohibiting live entertainment); *Central Hudson Gas & Electric Corp.* v. *Public Service Commission*, 447 U.S. 557 (1980) (regulation that prohibited utility from promoting use of electricty); *Consolidated Edison Co.* v. *Public Service Commission*, 447 U.S. 530 (1980) (regulation that prohibited utility from expressing views on "controversial issues of public policy"); *Village of Schaumburg* v. *Citizens for a Better Environment*, 444 U.S. 620 (1980) (ordinance prohibiting solicitation of charitable contributions); *Hynes* v. *Mayor of Oradell*, 425 U.S. 610 (1976) (ordinance regulating door-to-door canvassing and solicitation); *Healy* v. *James*, 408 U.S. 169 (1972) (denial by state college of official recognition for an SDS chapter); *NAACP* v. *Button*, 371 U.S. 415 (1963) (statute banning the solicitation of legal or professional business).

rationally furthers some legitimate, articulated state purpose and therefore does not constitute an invidious discrimination." *San Antonio Independent School District* v. *Rodriguez*, *supra*, 411 U.S. at 17; see *Maher* v. *Roe*, 432 U.S. 464, 470 (1977); *Harris* v. *McCrae*, 448 U.S. 297, 322 (1980); *Johnson* v. *Robison*, 415 U.S. 361, 375 n.14 (1974). We now show that the distinction drawn by Congress rationally furthers a legitimate legislative purpose.

B. Congress' Imposition Of Different Standards With Respect To The Lobbying Activities Of Veterans' Organizations And Other Categories Of Tax-Exempt Organizations Rationally Furthers The Legitimate Ends Of The Exempt Organizations Provisions

The classifications of Sections 501(c) and 170(c) are fully consistent with the requirements of equal protection because they "rest upon some ground of difference having a fair and substantial relation to the object of the legislation" (*Johnson* v. *Robison*, 415 U.S. 361, 374-375 (1974), quoting *F.S. Royster Guano Co.* v. *Commonwealth of Virginia*, 253 U.S. 412, 415 (1920)). This Court repeatedly has sustained classifications in remedial measures that do not abridge fundamental rights but rather address " 'the phase of the problem which seems most acute to the legislative mind.' " *Buckley* v. *Valeo*, 424 U.S. 1, 105 (1976), quoting *Williamson* v. *Lee Optical Co.*, 348 U.S. 483, 489 (1955); see *Katzenbach* v. *Morgan*, 384 U.S. 641, 657 (1966); *Jefferson* v. *Hackney*, 406 U.S. 535, 546 (1972). As its terms and history demonstrate, the lobbying limitation is precisely such a measure. It addresses what Congress regarded as a serious abuse of the exempt organization provisions—the lobbying activities of organizations within the class described by Section 501(c)(3). Furthermore, equal protection does not require that "things which are different in fact * * * be treated in law as though they were the same." *Tigner* v. *Texas*, 310 U.S. 141, 147 (1940). The debt which the nation owes to

veterans, who have endured the peril of war and the disruption of civil pursuits associated with service in the armed forces, provides ample justification for the favorable tax treatment granted to their organizations by Congress.

1. ***The lobbying limitation addresses a specific problem recognized by Congress***

a. In *Buckley* v. *Valeo*, *supra*, 424 U.S. at 105-108, this Court rejected an equal protection challenge to provisions of the Federal Election Campaign Act of 1971, 2 U.S.C. 431 *et seq.*, that grant public funding only for candidates who run in primary elections. As the Court stated (424 U.S. at 105, quoting *Katzenbach* v. *Morgan*, 384 U.S. 641, 567 (1966) (footnote omitted)):

> [I]n deciding the constitutional propriety of the limitations in such a reform measure we are guided by the familiar principles that a "statute is not invalid under the Constitution because it might have gone farther than it did," *Rochen* v. *Ward*, 279 U.S. 337, 339, that a legislature need not "strike at all evils at the same time," *Semler* v. *Dental Examiners*, 294 U.S. 608, 610, and that "reform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind," *Williamson* v. *Lee Optical Co.*, 348 U.S. 483, 489.

Applying that principle, the Court found that the distinctions drawn were "not an unreasonable way" to accomplish the underlying congressional objective of limiting the influence on primary elections of large private contributions and of discouraging frivolous candidacies. 424 U.S. at 106; see also *id.* at 96. Respect for the legislative judgment was fully applicable, the Court pointed out, to a claim of invidious discrimination "with First Amendment overtones" (*id.* at 105-106 n.143)—a claim such as appellee presses here.

The classification appellee challenges fits squarely within the doctrine reaffirmed by the Court in *Buckley*. The establishment of distinct categories of exempt organiza-

tions is a rational means of furthering the underlying congressional purpose of providing tax benefits to those organizations worthy of receiving them. See *Trinidad* v. *Sagrada Orden*, 263 U.S. 578, 581 (1924); *St. Louis Union Trust Co.* v. *United States*, 374 F.2d 427, 432 (8th Cir. 1967); H.R. Rep. No. 1860, 75th Cong., 3d Sess. 19 (1938). It derives also from the congressional policy, sharply defined in many contexts, against the use of large private contributions to distort the legislative process.[14]

A similar legislative motive underlies other statutes, including the Federal Regulation of Lobbying Act, ch. 753, 60 Stat. 839, 2 U.S.C. 261 *et seq.*, which requires that specified disclosures be made by any person who receives a contribution or expends money for the principal purpose of "influenc[ing] * * * the passage or defeat of any legislation by the Congress" (2 U.S.C. 264 and 266(b)). In *United States* v. *Harriss*, 347 U.S. 612 (1954), this Court characterized the purpose and spirit of the Lobbying Act as "to maintain the integrity of a basic governmental process" (*id.* at 625), and observed that to strike it down as violative of the First Amendment "would be to deny Congress in large measure the power of self-protection" (*id.* at 625-626). These expressions of a national policy reinforce the conclusion that "[a]ttempts to influence legislation are not the same as educational, charitable, religious, or scientific activities and they involve well-recognized dangers to representative Government procedures." *Haswell* v. *United States*, 500 F.2d 1133, 1150 (Ct. Cl. 1974), cert. denied, 419 U.S. 1107 (1975).

b. Contrary to the court of appeals' conclusions (J.S. App. 48a, 54a, 57a, 62a-67a), it is equally clear that

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[14] The history of the corresponding congressional policy to keep federal elections "free from the power of money" is recounted in *United States* v. *Automobile Workers*, 352 U.S. 567, 570-590 (1957). See also *Pipefitters Local No. 562* v. *United States*, 407 U.S. 385 (1972); *Burroughs & Cannon* v. *United States*, 290 U.S. 534 (1934); *Christian Echoes National Ministry, Inc.* v. *United States*, 470 F.2d 849, 857 (10th Cir. 1972), cert. denied, 414 U.S. 864 (1973).

Congress has recognized that it would be a greater threat to the goals of the exempt-organization statutes to grant organizations classified as charitable the authority to engage in substantial lobbying with tax-deductible contributions than to grant such authority to veterans' organizations. Congress enacted a lobbying limitation applicable in terms to charitable, educational, scientific, and religious groups, but not to veterans' organizations, and has maintained that distinction in effect for almost 50 years through repeated reenactments and amendments of the tax laws. This statutory system is not the result of inadvertence (see J.S. App. 78a-79a). On the contrary, the evolution of the relevant legislation leaves no doubt that the distinction drawn by Congress with respect to the treatment of veterans' groups and charitable organizations was intentional.[18]

As we pointed out (pages 15-16, *supra*), Section 501(c)(3), which grants tax exemption to organizations classified as charitable, derives from the Act of Aug. 27, 1894, ch. 349, Section 32, 28 Stat. 556. Its substance was carried into the first modern income tax statute, Act of Oct. 3, 1913, ch. 16, Section II(G)(a), 38 Stat. 172, which contained an exemption in favor of "any corporation or

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[18] This is not to imply, as the court of appeals did (J.S. App. 49a, 57a, 65a-66a & n.44), that the validity or character of the challenged classification turns on the legislative history. Rather, as the Court stated in *United States Railroad Retirement Board* v. *Fritz*, *supra*, 449 U.S. at 179:

> Where, as here, there are plausible reasons for Congress' action, our inquiry is at an end. It is, of course, "constitutionally irrelevenat whether this reasoning in fact underlay the legislative decision," *Flemming* v. *Nestor*, 363 U.S. at 612, because this Court has never insisted that a legislative body articulate its reasons for enacting a statute. This is particularly true where the legislature must necessarily engage in a process of line-drawing.

See also *United States* v. *Maryland Savings-Share Insurance Corp.*, *supra*; *Carmichael* v. *Southern Coal & Coke Co.*; *Western & Southern Life Insurance Co.* v. *State Board of Equalization*, *supra*.

association organized and operated exclusively for religious, charitable, scientific, or educational purposes * * *." Not until 1972 did Congress enact a separate category of exemption specifically to cover veterans' organizations. Veterans' organizations, however, were first accorded status as eligible donees of tax-deductible contributions in 1924 (see page 15, *supra*). Prior to 1972, veterans' groups qualified for exemption as social welfare organizations (Section 501(c)(4) of the 1954 Code), or as social clubs (Section 501(c)(7) of the 1954 Code). These provisions originated in Section II(G)(a) of the Revenue Act of 1913, and Section 11(a), Revenue Act of 1916, ch. 463, 39 Stat. 766.

The income tax deduction for charitable contributions, now found in Section 170(c)(2) of the Internal Revenue Code of 1954, has its origin in the War Revenue Act of 1917, ch. 63, Section 1201(2), 40 Stat. 330. See *Helvering* v. *Bliss*, 293 U.S. 144, 147 (1934). As carried into Section 214(a)(11) of the Revenue Act of 1918, ch. 18, 40 Stat. 1068, it provided deductions for gifts "to corporations organized and operated exclusively for religious, charitable, scientific, or educational purposes * * *." The deduction for income tax purposes for gifts to veterans' organizations (now Section 170(c)(3) of the 1954 Code) derives from Section 214(a)(11), Revenue Act of 1921, ch. 136, 42 Stat. 241, which added as an eligible donee of deductible contributions "posts of the American Legion or the women's auxiliary units thereof * * *." In the Revenue Act of 1924, this language was deleted and a separate category was created for gifts to "posts or organizations of war veterans, or auxiliary units or societies of any such posts or organizations" (Section 214(a)(10)(D), Revenue Act of 1924, ch. 234, 43 Stat. 271). Veterans' organizations have been continued as a separate category of eligible donees of deductible contributions ever since. See Internal Revenue Code of 1939, 26 U.S.C. (1940 ed.) 23(o)(2) and 23(q)(3).

At the time of these enactments, the revenue laws contained no expres limitations on lobbying by exempt organizations, and as we have pointed out (page 15, *supra*), no such limitations were imposed until the Revenue Act of 1934. As early as 1919, however, the Treasury promulgated Regulations providing that "associations formed to disseminate controversial or partisan propaganda are not educational within the meaning of the statute" which granted exemption to charitable, religious, and educational groups. Art. 517, Treas. Reg. § 45, promulgated by T.D. 2831, 21 Treas. Dec. Int. Rev. 285 (1919); cf. Treasury Regulations on Income Tax (1954 Code), 26 C.F.R. 1.501(c)(3)-1(d)(3). The courts repeatedly sustained that conclusion as to a range of partisan organizations claiming exemption as charitable, scientific or educational even before the enactment of the Revenue Act of 1934.[16] In the leading case, *Slee* v. *Commissioner*, 42

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[16] *Slee* v. *Commissioner*, 42 F.2d 184 (2d Cir. 1930) (American Birth Control League; *Fales* v. *Commissioner*, 9 B.T.A. 828 (1927) (Scientific Temperance Association); *Coxe* v. *Commissioner*, 5 B.T.A. 261 (1926) (League to Enforce Peace); *Forstall* v. *Commissioner*, 29 B.T.A. 428, 436 (1933) (League of Nations Association); *Watson* v. *Commissioner*, 27 B.T.A. 463, 468 (1932) (Citizens League of Cleveland).

During this period, Congress also turned its attention to the status and operations of groups engaged in lobbying. As early as 1913, the House conducted an investigation into the activity "for the purpose of improperly influencing legislation" of the National Association of Manufacturers, a nonprofit association, the National Council for Industrial Defense, and other groups. H.R. Rep. No. 113, 63d Cong., 2d Sess. (1913); 51 Cong. Rec. 565, 566-567 (1913). From 1928-1931, the Caraway Committee investigated activities designed to affect legislation, and its reports detailed the expenditures made and contributions solicited and received by various groups in attempts indirectly to influence legislation. See S. Rep. No. 43 (Pt. 4), 71st Cong., 1st Sess. 6-7 (1930) (American Taxpayers' League), Pt. 7 (Muscle Shoals lobby), Pt. 8 (Association Against the Prohibition Amendment). Senator Caraway cited as among the evils he hoped to correct "fake agricultural associations, fake scientific associations, fake religious associations, * * * fake associations in opposition to prohibition" (S. Rep. No. 342, 70th Cong., 1st Sess. 2, 3 (1928)).

F.2d 184, 185 (2d Cir. 1930), Judge Learned Hand addressed whether the American Birth Control League qualified as an eligible donee of deductible charitable contributions under a predecessor of Section 170(c)(2), as follows:

> It may indeed be for the best interests of any community voluntarily to control the procreation of children, but the question before us is whether the statute covers efforts to proselytize in that or other causes. Of the purposes it defines "educational" comes the closest, and when people organize to secure the more general acceptance of beliefs which they think beneficial to the community at large, it is common enough to say that the public must be "educated" to their views. In a sense that is indeed true, but it would be a perversion to stretch the meaning of the statute to such cases; they are indistinguishable from societies to promote or defeat prohibition, to adhere to the League of Nations, to increase the Navy, or any other of the many causes in which ardent persons engage.

As this Court observed in *Cammarano* v. *United States*, *supra*, 358 U.S. at 512, the subsequent addition to the charitable exemption and deduction statutes by the Revenue Act of 1934 "made explicit the conclusion derived by Judge Learned Hand in 1930" in *Slee*. The 1934 Act clearly addressed the abuse of the statutes which Congress perceived as most in need of correction. It originated in the Senate Finance Committee. According to the committee's chairman (78 Cong. Rec. 5959 (1934) (Sen. Harrison)):[17]

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[17] See 78 Cong. Rec. 5861 (1934) (Sen. Reed):

> There is no reason in the world why a contribution made to the National Economy League should be deductible as if it were a charitable contribution if it is a selfish one made to advance the personal interests of the giver of the money. That is what the committee was trying to reach, but we found great difficulty in phrasing the amendment.

> the attention of the Senate committee was called to the fact that there are certain organizations which are receiving contributions in order to influence legislation and carry on propaganda. The committee thought there ought to be an amendment which would stop that, so that is why we have put this amendment in the bill.

Although the chairman thereupon expressed his personal view—previously "called [to] the attention of the experts"— that the proviso as to lobbying should be inserted in another place in the bill so that it would apply to all organizations otherwise eligible to receive tax-deductible contributions, including "war organizations," the Congress, with his view before it, enacted, and has since maintained in continuous effect, a limitation applicable by its terms only to organizations classified as charitable, and not to veterans' organizations.[18] See Revenue Act of

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[18] 78 Cong. Rec. 5959 (1934) (Sen. Harrison). As reflected in the debate, the focus of the 1934 Act was on the provision (Section 23(o)(2)) that governed the deductibility for income tax purposes of contributions to organizations classified as charitable that engaged in influencing legislation. The concurrent exemption provision covering charitable organizations (Section 101(6)) was recommended by the Senate Finance Committee "in accordance with the change [in] section 23(o)" and the concurrent provisions governing the deductibility for estate and gift tax purposes of charitable contributions (Sections 406 and 517) were "necessary to carry out the policy adopted in section 23(o)(2)." S. Rep. No. 558, 73d Cong., 2d Sess. 30, 46, 52 (1934); see *id.* at 26.

There is no support for the court of appeals' suggestion that the exemption of veterans' groups from the lobbying limitation was due to "a drafting oversight" (J.S. App. 52a; see *id.* at 54a). The Revenue Act of 1934 recognized five discrete categories of organizations as eligible donees of contributions deductible for income tax purposes: the United States, any state, or any political subdivision thereof (Section 23(o)(1)); religious, charitable, scientific or educational organizations (Section 23(o)(2)); the special fund for vocational rehabilitation authorized by Section 12 of the World War Veterans Act of 1924, ch. 320, 43 Stat. 611 (Section 23(o)(3)); posts or organizations of war veterans, or auxiliary units or societies of any such posts or organizations (Sec-

1934, ch. 277, Sections 23(o)(2), 101(6), 406, and 517, 48 Stat. 690, 700, 755, 760. Internal Revenue Code of 1939, 26 U.S.C. (1940 ed.) 23(o)(2), (q)(2) and 101(6); Internal Revenue Code of 1954, 26 U.S.C. 170(c)(2) and 501(c)(3).

c. Since 1934, Congress has repeatedly reaffirmed the need for these limitations as a curb upon the flow of tax-exempt and tax-deductible funds to charitable organizations active in political and legislative matters. But it has never extended these restrictions to veterans' organizations.

In enacting the Tax Reform Act of 1969, Pub. L. No. 91-172, 83 Stat. 487 *et seq.*, a major overhaul of the provisions governing charitable organizations, Congress added to the Code Sections 507-509 and 4945 which impose

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tion 23(o)(4)); a fraternal society operating under the lodge system (Section 23(o)(5)). Of these provisions, the 1934 Act added the lobbying limitation only to Section 23(o)(2), relating to charitable organizations. The Senate amendment to Section 23(o)(2) would have prohibited any income tax deductions for contributions to charitable organizations, "a substantial part of the activities of which is participation in partisan politics or is carrying on propaganda, or otherwise attempting, to influence legislation." See S. Rep. No. 558, 73d Cong., 2d Sess. 26 (1934). But the House conferees were concerned that even that prohibition was "too broad" (78 Cong. Rec. 7831 (1934)). They accordingly succeeded in convincing the Senate conferees to strike the reference to "participation in partisan politics" (*ibid.*). Similar concessions were made in the amendments relating to the exemption for charitable organizations and to the allowance of deductions for gift and estate tax purposes for gifts to charitable organizations. *Ibid.* See H.R. Conf. Rep. No. 1385, 73d Cong., 2d Sess. 17, 19 (1934). (The phrase deleted was not restored to the statutes until the enactment of the Internal Revenue Code of 1954, Sections 170(c)(2) and 501(c)(3), which deny exemption or deductibility of contributions for charitable organizations which "participate in or intervene in (including the publishing or distributing of statements), any political campaign on behalf of any candidate for public office." See also 26 U.S.C. 2055(a)(2), 2522(a)(2) and (b)(2)). At all events, even on the assumption that a "drafting error" occurred in 1934, the plain fact is that Congress has never seen fit to correct it during its successive reviews of the tax exemption provisions.

on charitable organizations classified as private foundations an excise tax for their expenditures to influence legislation or to influence public elections. The accompanying committee reports detail legislative and political activities by these organizations that had come to the attention of Congress. H.R. Rep. No. 91-413 (Pt. 1), 91st Cong., 1st Sess. 32-33 (1969); S. Rep. No. 91-552, 91st Cong., 1st Sess. 47-48 (1969). As the reports explain, "[c]ongressional policy regarding carrying on this type of political activity with tax-exempt or tax-deductible funds appears to be clear in view of the language of present law" (*ibid.*). The subsequent addition to the Code of Sections 501(h) and 4911 (by Section 1307, Tax Reform Act of 1976, Pub. L. No. 94-455, 90 Stat. 1720-1729), the fruit of extensive deliberations spanning more than 5 years,[19] imposes an excise tax on certain expenditures for legislative activity by "public charities" which elect to be covered by those statutes, and establishes precise limits on the amount which an electing "public charity" may spend on legislative activity without incurring that excise tax or loss of its Section 501(c)(3) status and qualification for tax-deductible contributions.[20]

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[19] The dissent below cited several of the bills introduced during this period (J.S. App. 101a n.26). See also *Legislative Activity by Certain Types of Exempt Organizations: Hearings on H.R. 13720 Before the House Comm. on Ways and Means*, 92d Cong., 2d Sess. (1972); *General Tax Reform: Hearings Before the House Comm. on Ways and Means*, 93d Cong., 1st Sess. (1973); *Influencing Legislation by Public Charities: Hearings on H.R. 13500 Before the House Comm. on Ways and Means*, 94th Cong., 2d Sess. (1976); Geske, *Direct Lobbying Activities of Public Charities*, 26 Tax Law. 305, 310-319 (1973).

[20] Sections 501(h) and 4911 give a detailed meaning to the terms "substantial part," "activities," and "attempting * * * to influence legislation" that appear in Section 501(c)(3). A "public charity," which so elects, shall not lose its status under Sections 501(c)(3) and 170(c)(2) because a substantial part of its activities consists of attempts to influence legislation unless it normally spends for that purpose more than a specified percentage, determined on a sliding scale, of the total amount it spends to accomplish its exempt pur-

As the dissent below pointed out, this confirmation of the need for restrictions on legislative activity by charitable organizations, made in the face of opposition and after prolonged debate, "suggest[s] that doubts about the purpose of that section as adopted in 1934 are largely misconceived" (J.S. App. 103a n.29).

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pose. 26 U.S.C. 501(h) and 26 U.S.C. (& Supp. IV) 4911 (added by Section 1307, Tax Reform Act of 1976, Pub. L. No. 94-455, 90 Stat. 1720-1729); see S. Rep. No. 94-938 (Pt. 2), 94th Cong., 2d Sess. 79-80 (1976). This amendment specifies that an activity is not regarded as "influencing legislation" if it consists of nonpartisan analysis or research; advice or assistance in response to a request from a legislature; or appearances before or communications to a legislature concerning any matter that might affect the powers, duties, or tax status of the organization. 26 U.S.C. 4911(d); cf. 26 U.S.C. 4945(e); Treasury Regulations on Foundation and Similar Excise Tax (1954 Code), 26 C.F.R. 53.4945-2(d), applicable to private foundations; *Haswell* v. *United States*, *supra*, 500 F.2d at 1141-1145.

Were appellee otherwise qualified under Sections 501(c)(3) and 170(c)(2), it would have been entitled to make this election under Section 501(h) as an organization expecting to draw its support from the general public (J.A. 35). A predecessor organization of appellee, TWR Fund, whose operations appellee assumed, so qualified (J.A. 53). See 26 U.S.C. 501(h)(4)(D), and (E), 509(a)(2), 170(b)(1)(A)(vi). Thus, if appellee spent $200,000 per year to further its exempt purposes, as TWR Fund proposed to do in 1979 (J.A. 24), it could spend up to 30 percent of that amount to influence legislation through presentations before a legislature and still qualify for Section 501(c)(3) status and for eligibility to receive tax-deductible contributions. 26 U.S.C. 501(h)(1) and (2); 26 U.S.C. (& Supp. IV) 4911(c) and 26 U.S.C. 4911(d).

Contrary to the suggestion of the court below (J.S. App. 19a n.6) the fact that appellee did not elect Section 501(h) treatment (see J.A. 17-18) does not render the provisions irrelevant. Cf. *Alexander* v. *"Americans United" Inc.*, 416 U.S. 752, 762 n.13 (1974). Section 501(h) provides a mechanism by which appellee can assure that it may engage in a specified amount of lobbying without inviting a challenge to its Section 501(c)(3) exemption (J.S. App. 100a-106a; dissenting opinion). The statute therefore represents a considered accommodation, to the extent consistent with the aims of the exempt organization provisions, of the First Amendment values inherent in legislative advocacy. Cf. *United States* v. *Lee*, No. 80-767 (Feb. 23, 1982).

In the course of refining the lobbying limitation applicable to charitable organizations, Congress turned its attention specifically to the tax treatment of veterans' organizations, and continued in effect their longstanding exemption from the lobbying limitation imposed on charitable organizations. 26 U.S.C. 501(c)(19), added by Section 2, Act of Aug. 29, 1972, Pub. L. No. 92-418, 86 Stat. 656; see H.R. Rep. No. 92-851, 92d Cong., 2d Sess. 2-3 (1972); S. Rep. No. 92-1082, 92d Cong., 2d Sess. 1, 3, 4-5 (1972). Indeed, as recently as August 1982, Congress amended the membership requirement of Section 501(c)(19) without imposing a lobbying limitation on veterans' organizations. Section 354, Tax Equity & Fiscal Responsibility Act of 1982, Pub. L. No. 97-248, 96 Stat. 640.

Finally, apart from the tax benefits enjoyed by veterans' organizations over Section 501(c)(3) organizations with respect to lobbying, it is significant that veterans' organizations are subject to certain statutory restrictions that are not applicable to Section 501(c)(3) organizations. For example, while an individual may generally deduct contributions to Section 501(c)(3) organizations up to 50% of his adjusted gross income, he may deduct only 20% of his adjusted gross income for contributions to veterans' organizations. See Section 170(b)(1)(B). Second, the carryover of contributions in excess of the percentage limitations is applicable to Section 501(c)(3) organizations but not to gifts to veterans' organizations. Section 170(d). Third, contributions by private foundations to veterans' organizations are subject to the 10% excise tax on taxable expenditures unless the grantor receives assurance that the contribution will be used only for charitable purposes. See Section 4945(a), (d)(5); Treasury Regulations on Foundation and Similar Excise Tax, 26 C.F.R. 53.4945-6(c). Fourth, the estate tax deduction for gifts to veterans' organizations is limited to those organizations incorporated by Act of Congress. See Section 2055(a)(4). Cf. Section

170(c)(3) (income tax); Section 2522(a)(4) (gift tax). Moreover, nonresident decedents are permitted an estate tax deduction for gifts to Section 501(c)(3) organizations but not to veterans' organizations. See Section 2106(a)(2)(A). Cf. Section 2522(b) (gift tax). Finally, unlike Section 501(c)(3) organizations, veterans' organizations are not eligible for gifts of inventory or conservation property. See Sections 170(e)(3) and 170(h) (26 U.S.C. (& Supp. IV)).

Hence, it is plain that the Internal Revenue Code does not favor veterans' organizations over Section 501(c)(3) organizations in every respect across the board. Quite the contrary, the detailed tax exemption provisions reveal that Congress separately addressed each aspect of the activities of the categories of exempt organizations. For the court of appeals to single out the lobbying restriction upon Section 501(c)(3) organizations as violative of the equal protection guaranty destroys the balance of the statutory system established by Congress during the past 50 years.

d. Given the careful and virtually continuous legislative attention to the problems posed by the various categories of exempt organizations, it is "surely not * * * unreasonable" (*Buckley* v. *Valeo*, *supra*, 424 U.S. at 106) to assume that Congress regarded the lobbying activity of charitable organizations as more susceptible to abuse than the lobbying activity of veterans' groups. The Internal Revenue Service advises that as of the close of 1981, approximately 300,000 organizations were recognized as exempt under Section 501(c)(3), but only approximately 35,000 veterans' groups were listed as exempt under Section 501(c)(4) and (19). As the court of appeals pointed out (J.S. App. 73a), contributions to Section 501(c)(3) organizations aggregated more than $21.9 billion in 1978, nearly 1500 times the $16.7 million given to veterans' organizations. These statistics reinforce the court's own conclusion that "if we permitted Section 501(c)(3) groups to lobby as freely as veterans' organizations, there would be a clear risk of abuse by private

interests and an increase in the amount of 'selfish' contributions 'made to advance the personal interests of the giver of the money'" (J.S. App. 73a-74a, quoting 78 Cong. Rec. 5861 (1934) (Sen. Reed)).

What is more, Congress has not in fact given veterans' organizations carte blanche authority to lobby. As the dissent below pointed out (J.S. App. 116a-117a), the federal statutes that charter the AMVETS and the Blind Veterans of World War I, among other prominent veterans' groups, bar them from engaging in partisan activity and otherwise limit their legislative and political involvements.[21] Only last year, Congress granted charters to two veterans' organizations subject to the restriction that they 'shall not contribute to, support or otherwise participate in any political activity or in any manner attempt to influence legislation." Act of Nov. 20, 1981, Pub. L. No. 97-82, Section 8(c), 95 Stat. 1092, to be codified at 36 U.S.C. 1708(c) (Italian American War Veterans of the United States); Act of Nov. 20, 1981, Pub. L. No. 97-83, Section 8(c), 95 Stat. 1095, to be codified at 36 U.S.C. 1808(c) (United States Submarine Veterans of World War II).[22]

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[21] See 36 U.S.C. 67d ("No part of the activities of [American Veterans of World War II] shall consist of carrying on propaganda" and "[t]he corporation * * * shall not contribute to or otherwise support or assist any political party or candidate for elective public office"); Section 86 ("The [Blind Veterans of World War I] shall be nonpolitical and shall not be used for the dissemination of partisan principles"). See also 36 U.S.C. 46 (American Legion); Section 90a (Disabled American Veterans); Section 1156 (Paralyzed Veterans of America).

[22] Congress is well equipped to police these restrictions and to ascertain the extent of any political or legislative activity by veterans' organizations under federal charter. The receipts and expenditures of all private corporations established by federal law must be audited annually by an independent accountant and a report thereof submitted to the Congress. 36 U.S.C. 1102. Among the veterans' organizations subject to this requirement are The American Legion, AMVETS, Disabled American Veterans, Jewish War

Nor was the court of appeals correct in assuming that the Internal Revenue Code provides "open-ended subsidization of any position that these groups choose to espouse" (J.S. App. 72a; see *id.* at 23a). The Treasury Regulations under Section 501(c)(19) make explicit that a veterans' organization does not qualify for tax-exempt status under that section unless it is operated "exclusively" for one or more enumerated exempt purposes. Treasury Regulations on Income Tax (1954 Code), 26 C.F.R. 1.501(c)(19)-1(c). Among these are to promote the social welfare by bringing about civic betterments and social improvements (cf. Section 501(c)(4) and Treasury Regulations on Income Tax (1954 Code), 26 C.F.R. 1.501(c)(4)-1(a)(2)); to assist disabled and needy war veterans and their dependents; to carry on programs to perpetuate the memory of deceased veterans; to conduct programs for charitable purposes (cf. Section 501(c)(3)); or to provide social and recreational activities for their members (cf. Section 501(c)(1)).[23] Thus, a veterans' group that engages in ac-

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Veterans, United States Blind Veterans of World War I, Veterans of Foreign Wars of the United States, Veterans of World War I of the United States, Italian American War Veterans of the United States, United States Submarine Veterans of World War II, and the Paralyzed Veterans of America. 36 U.S.C. 1101 and 1166. Many of these organizations are also required annually to file with Congress reports of their proceedings. E.g., 36 U.S.C. 49 (The American Legion); Section 90i (Disabled American Veterans); Section 118 (Veterans of Foreign Wars of the United States).

[23] The requirement that it be operated exclusively for one or more among enumerated purposes applies also to a veterans' organization that claims exemption as a social welfare organization or as a social club. See 26 U.S.C. 501(c)(4) and (7); Treasury Regulations on Income Tax (1954 Code), 26 C.F.R. 1.501(c)(7)-1. Veterans' organizations established under federal law are subject to analogous restrictions as a condition to maintaining their charters. See e.g., 36 U.S.C. 43 (The American Legion); Section 113 (Veterans of Foreign Wars); Section 90c (Disabled American Veterans). The recently chartered Italian American War Veterans of the United States and the United States Submarine Veterans of World War II must maintain tax-exempt status or forfeit their charters. Pub. L. No. 97-82, Section 15, 95 Stat. 1093, to be codified

tivity, including lobbying activity, that forms more than an insubstantial part of its overall activity and that is unrelated to its exempt purpose is subject to denial of exempt status and to disqualification for tax-deductible contributions. Cf. note 10, *supra*.

By these and other means Congress has ensured that the lobbying activity of veterans' organizations is directed toward the purpose for which they were chartered. These limitations buttress Congress' determination that an extension to veterans' organizations of the lobbying restriction applied by the Internal Revenue Code to Section 501 (c) (3) organizations is not necessary to redress or prevent abuses by veterans' organizations of their status. Cf. *California Medical Association* v. *FEC*, 453 U.S. 182, 200 (1981); *Marker* v. *Shultz*, 485 F.2d 1002, 1007 (D.C. Cir. 1973).[24]

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at 36 U.S.C. 1714; Pub. L. No. 97-83, Section 15, 95 Stat. 1096, to be codified at 36 U.S.C. 1814.

Moreover, Section 170(f)(6) of the Code denies a charitable contribution deduction for out-of-pocket lobbying expenditure made on behalf of Section 501(c)(3) organizations *and* Section 501(c)(19) veterans' organizations.

[24] The court of appeals' suggestion that veterans' organizations exceed these limitations, to the disadvantage of appellee, is entirely speculative (see J.S. App. 23a-24a & n.11, 72a n.49). Nor has it relevance to this proceeding which was instituted under Section 7428 of the Code. No judgment may be rendered under that statute unless the petitioning organization first has exhausted its administrative remedies within the Internal Revenue Service. 26 U.S.C. 7428(b)(2). The decisions interpreting that requirement uniformly hold that in cases as here, involving the initial qualification of an organization, the facts must be confined to those contained in the administrative record already developed before the Commissioner at the time of his adverse ruling. *Houston Lawyer Referral Service, Inc.* v. *Commissioner*, 69 T.C. 570 (1978); *Est of Hawaii* v. *Commissioner*, 71 T.C. 1067, 1076-1078 (1979), aff'd, 647 F.2d 170 (9th Cir. 1981); *Animal Protection Institute, Inc.* v. *United States*, 42 A.F.T.R.2d (P-H) ¶ 78-5234 (Ct. Cl. 1978); *Virginia Professional Standards Review Foundation* v. *Blumenthal*, 466 F. Supp. 1164, 1167-1168 (D.C. 1979); *Southwest Virginia*

2. *The unique status of veterans' organizations amply justifies the less restrictive lobbying limitations granted them by Congress*

At all events, any disparity in Congress' treatment of lobbying activities by veterans' organizations and other categories of tax-exempt organizations rests upon grounds that are more than sufficient to meet the demands of equal protection. As the Fourth Circuit correctly concluded in *Taxation With Representation* v. *United States*, 585 F.2d 1219, 1224 (1978), cert. denied, 441 U.S. 905 (1979), in rejecting an identical equal protection claim by an organizational predecessor of appellee, "the unique and compelling societal and governmental goals served by * * * [veterans'] organizations provide ample justification for the special tax treatment extended to them by the Congress." See also J.S. App. 115a-116a (dissenting opinion); 38 U.S.C. 3402 (providing for recognition of veterans' organizations as the representatives of veterans in the prosecution of claims before the Veterans' Administration). In order to be eligible to receive tax-deductible contributions, a veterans' organization must be composed principally of war veterans.[25] 26 U.S.C. 170(c)(3). To

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Professional Standards Review Organization, Inc. v. *United States*, 42 A.F.T.R.2d (P-H) ¶ 78-5315 (D.C. Cir. 1978); see Rule 217, Tax Ct. R. (rev. 1977). These decisions are in accord with the legislative history of the statute. H.R. Rep. No. 94-658, 94th Cong., 1st Sess. 282, 286 & n.7 (1975); S. Rep. No. 94-938 (Pt. 2), 94th Cong., 2d Sess. 585, 588 & n.7 (1976).

[25] See Rev. Rul. 55-156, 1955-1 Cum. Bull. 292 (no income tax deduction under Section 23(o)(4) of the Code of 1939 for gift to reserve officers' association not composed "essentially" of war veterans). The recent amendment to Section 501(c)(19) of the 1954 Code (by Section 354, Tax Equity & Fiscal Responsibility Act of 1982, Pub. L. No. 97-248, 96 Stat. 640), which enables an organization composed principally of veterans to qualify for exemption thereunder (whether or not composed principally of war veterans) does not appear to relax the requirements for qualification as an eligible donee under Section 170(c)(3). As indicated above, Section 170(c)(3) and its statutory predecessors long antedate Section

these individuals of war the nation owes special gratitude for enduring the peril, and disruption of civil pursuits associated with wartime service in the armed forces. Indeed, "it is apparent to anyone who has lived through periods of war that contrived explanations are not necessary." *August* v. *Bronstein*, 369 F. Supp. 190, 193 (S.D.N.Y.), summarily aff'd, 417 U.S. 901 (1974).

Both Congress and state legislatures have recognized that debt by establishing veterans' preferences and other statutory benefits "to protect those who have been obliged to drop their own affairs to take up the burdens of the nation." *Boone* v. *Lightner*, 319 U.S. 561, 575 (1943). Accord, *Le Maistre* v. *Leffers*, 333 U.S. 1, 6 (1948). The legislative authority to provide such special benefits for veterans has been sustained repeatedly against constitutional attack.[26] Thus, in *Johnson* v. *Robison*, 415 U.S. 361, 374-386 (1974), the Court rejected an equal protection challenge to provisions of the Veterans' Readjustment Benefits Act of 1966 (38 U.S.C. 101) that limit the educational benefits provided thereunder to veterans who served on active duty. The Court underscored that "it is * * * [youths called to extended tours of military service]

501(c)(19), which was enacted specifically to provide that income a veterans' organization receives from insuring its members is not subject to the unrelated business income tax to the extent set aside for insurance benefits or for charitable purposes. See 26 U.S.C. 512(a)(4); H.R. Rep. No. 92-851, 92d Cong., 2d Sess. (1972); S. Rep. No. 92-1082, 92d Cong., 2d Sess. (1972).

[26] See *Personnel Administrator* v. *Feeney*, 442 U.S. 256 (1979); *Johnson* v. *Robison*, 415 U.S. 361, 374-386 (1974); *Russell* v. *Hodges*, 470 F.2d 212 (2d Cir. 1972); *Rios* v. *Dillman*, 499 F.2d 329 (5th Cir. 1974); *Frederick* v. *United States*, 507 F.2d 1264 (Ct. Cl. 1974); *Bannerman* v. *Department of Youth Authority*, 436 F. Supp. 1273 (N.D. Cal. 1977); *Branch* v. *Du Bois*, 418 F. Supp. 1128 (N.D. Ill. 1976); *Feinerman* v. *Jones*, 356 F. Supp. 252 (M.D. Pa. 1973) (three-judge court); *Koelfgen* v. *Jackson*, 355 F. Supp. 243 (D. Minn. 1972) (three-judge court), aff'd mem., 410 U.S. 976 (1973); cf. *Mitchell* v. *Cohen*, 333 U.S. 411 (1948). See also *United States* v. *Oregon*, 366 U.S. 643, 648-649 (1961).

who must serve in the Armed Forces throughout troubled parts of the world, thereby subjecting themselves to the mental and physical hazards as well as the economic and family detriments which are peculiar to military service and which do not exist in normal civil life." 415 U.S. at 380 (emphasis omitted), quoting S. Rep. No. 269, 89th Cong., 1st Sess. 6-7, 8 (1965). It concluded that this peculiar hardship formed a rational basis for denying the same benefits to a conscientious objector who had completed two years of alternate civilian service. 415 U.S. at 363-364, 381-383. See also *Mitchell* v. *Cohen*, 333 U.S. 411, 417-422 (1948); *Hilton* v. *Sullivan*, 334 U.S. 323 (1948); *Personnel Administrator* v. *Feeney*, 442 U.S. 256, 274-275, 279 n.25 (1979) ("the impact [of the veterans' preference] is essentially an unavoidable consequence of a legislative policy that has in itself always been deemed to be legitimate").[27]

Appellee has no stronger claim to be placed on the same tax footing as veterans' organizations than did the conscientious objector in *Robison* to achieve the same educational benefits as war veterans. The tax benefits granted veterans' organizations under the Internal Revenue Code are analogous to the other veterans' benefits that time and again have been upheld.[28] In the exercise of its broad

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[27] Given the strong national policy favoring veterans, we submit that the statutes in question could be upheld even under a heightened standard of judicial scrutiny.

[28] Indeed, the income tax deduction provision now found in Section 170(c) of the Code was enacted as a wartime measure to encourage charitable giving. War Revenue Act of 1917, ch. 63, Section 1201(2), 40 Stat. 330. As its sponsor observed, "I believe that the Senate will see the necessity for voting that exemption in war times." 55 Cong. Rec. 6728 (1917) (Sen. Hollis). The following year, there was added to the list of eligible donees "the special fund for vocational rehabilitation authorized by section 7 of the Vocational Rehabilitation Act [40 Stat. 617]" (Section 214(a)(11), Revenue Act of 1918, ch. 18, 40 Stat. 1068). The Act provided for vocational rehabilitation and for return to civil employment of dis-

power to "singl[e] out * * * one particular class for taxation or exemption" (*Carmichael* v. *Southern Coal & Coke Co.*, 301 U.S. 495, 509 (1937)), Congress has similar authority to protect the interests of veterans by allowing their organizations to use tax-deductible contributions to lobby on matters of importance to veterans without allowing other types of organizations to lobby to the same extent with tax-deductible funds.

Finally, it bears emphasis that the provisions at issue here are but a few among many in the complex and highly articulated exempt organization provisions of the Internal Revenue Code. An examination of the 22 categories of organizations granted exemption by Section 501(c), and the five categories of organizations recognized as donees of tax-deductible contributions under Section 170(c), discloses the range of discrete interests Congress has chosen to favor with these tax benefits (J.S. App. 123a-141a).

The decision below invites disruption of this statutory system not only with respect to Section 501(c)(3) organizations or to veterans' organizations. It could be argued with equal logic that a government agency or a cemetery company enjoys a tax preference over Section 501(c)(3) organizations such as appellee because, as in the case of a veterans' organization, it may lobby a substantial amount in furtherance of its exempt purpose and still retain

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abled veterans discharged from the Armed Forces. The special fund created by that Act, and by its successor enactment, the World War Veterans' Act of 1924, ch. 320, 43 Stat. 607 *et seq.*, was carried forward for more than 30 years as a separate category of donee eligible for tax-deductible contributions. See Section 23(o)(3), Internal Revenue Code of 1939 (26 U.S.C. (1940 ed.)). Thus, when Senator Lodge introduced the 1921 Amendment that made the American Legion an eligible donee of deductible contributions, he described the amendment with accuracy as one "to which I think there can be no possible objection." 61 Cong. Rec. 7066 (1921). Cf. Internal Revenue Code of 1954, 26 U.S.C. 112, 113, 217(g), 692, 1034(h), 2201 and 3401(a)(1), relating to tax benefits accorded to members of the Armed Forces.

eligibility to receive tax exemption and tax-deductible contributions. 26 U.S.C. 170(c)(1) and (5), 501(c)(13). The same could be said of other exempt organizations, including labor unions and business leagues granted exemption, respectively, by Section 501(c)(5) and (6). See *Associated Industries* v. *Commissioner*, 7 T.C. 1449, 1466 n.2 (1946), acq., 1947-1 Cum. Bull. 1; *Marker* v. *Shultz*, 485 F.2d 1003, 1007 (D.C. Cir. 1973); Rev. Rul. 61-177, 1961-2 Cum. Bull. 117 (business league qualifies for exemption where its sole or principal activity consists of advocating legislation beneficial to its common business interest); see generally *National Muffler Dealers Association* v. *United States*, 440 U.S. 472 (1979). Contributions to such organizations, which usually take the form of dues, may be deductible in whole or in part as business expenses even though the donee engages in substantial legislative activity. See Section 162(e); Treasury Regulations on Income Tax (1954 Code), 26 C.F.R. 1.162-20 (c)(3).

Each of these provisions reflects, as did the statutes involved in *California Medical Association* v. *FEC*, 453 U.S. 182, 201 (1981), "a judgment by Congress that these entities have differing structures and purposes, and that they therefore may require different forms of regulation * * *." In particular, organizations composed of veterans differ fundamentally in their status from appellee, which has been organized for the primary purpose of persuading Congress to its views on matters of taxation. The equal protection guaranty does not demand that these distinct categories of tax-exempt organizations be accorded identical treatment.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

REX E. LEE
Solicitor General

GLENN L. ARCHER, JR.
Assistant Attorney General

LAWRENCE G. WALLACE
Deputy Solicitor General

STUART A. SMITH
Assistant to the Solicitor General

RICHARD FARBER
ROBERT S. POMERANCE
Attorneys

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DONALD T. REGAN, SECRETARY OF THE TREASURY, *et al.*,

Appellants,

v.

TAXATION WITH REPRESENTATION OF WASHINGTON,

Appellee.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF OF APPELLEE

John Cary Sims
(Counsel of Record)

Alan B. Morrison
Public Citizen Litigation Group
Suite 700
2000 P Street, N.W.
Washington, D.C. 20036
(202) 785-3704

Thomas F. Field
6830 North Fairfax Drive
Arlington, Virginia 22213
(703) 532-1850

Attorneys for Appellee
Taxation with Representation of
Washington

February 11, 1983

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TABLE OF CONTENTS

Page

STATEMENT OF THE CASE 1

SUMMARY OF ARGUMENT 11

ARGUMENT 15

I. The Restriction On Lobbying Which Is At Issue In This Case Is Subject To An Exacting Standard Of Judicial Review 15

A. Lobbying Is Protected By The First Amendment 16

B. A Strict Standard Of Review Should Be Applied Because Section 501(c)(3) Abridges Taxation's First Amendment Rights By Placing An Unconstitutional Condition Upon Their Exercise 18

C. Because The Equal Protection Claim Presented In This Case Involves Government Regulation Of First Amendment Rights, Only An Exacting Standard Of Review Would Be Appropriate Even If No Independent First Amendment Claim Could be Established 24

D. The Regulation Of Speech Which Is Challenged In This Case Is Content-Based, And Therefore It Should Be Subjected To An Especially Stringent Standard Of Review 27

II. The Discrimination Against Lobbying By Charities Denies Taxation The Equal Protection Of The Laws 30

A. The History Of The Restriction 31

B. *Cammarano v. United States* Does Not Support The Discrimination Against Lobbying By Charities 35

Page

C. None Of The Explanations Offered Justifies Prohibiting Substantial Lobbying By Charities While Permitting Veterans' Groups To Lobby Without Limitation 37

1. The Justifications For The Lobbying Restriction On Charities Are Insubstantial 37

2. There Are No Differences Between Charities And Veterans' Groups Which Justify Disparate Treatment With Respect To Lobbying 45

D. The Restriction On Lobbying By Charities Should Be Eliminated 50

CONCLUSION 53

TABLE OF AUTHORITIES

Cases: **Page**

Abood v. Detroit Board of Education,
431 U.S. 209 (1977) 22

Alexander v. "Americans United" Inc.,
416 U.S. 752 (1974) 5, 10-11

American Communications Ass'n v. Douds,
339 U.S. 382 (1950) 45

Bates v. City of Little Rock,
361 U.S. 516 (1960) 19

Big Mama Rag, Inc. v. United States,
631 F.2d 1030 (D.C. Cir. 1980) 19

Bob Jones University v. Simon,
416 U.S. 725 (1974) 5, 10-11

Bolling v. Sharpe,
347 U.S. 499 (1954) 2

Brown v. Socialist Workers '74 Campaign Committee,
103 S. Ct. 416 (1982) 9

Buckley v. Valeo,
424 U.S. 1 (1976) 2, 17, 38, 41, 42-45

Califano v. Westcott,
443 U.S. 76 (1979) 50-51

California Motor Transport Co. v. Trucking Unlimited,
404 U.S. 508 (1972) 17

Cammarano v. United States,
358 U.S. 498 (1959) ..... *passim*

Page

Carey v. Brown,
447 U.S. 455 (1980) 14, 25, 28-30, 51, 52

Citizens Against Rent Control/Coalition for Fair Housing v. City of Berkeley,
454 U.S. 290 (1981) 12, 15, 16, 17, 24-25, 26, 48

Committee for Public Education and Religious Liberty v. Nyquist, 413 U.S. 756 (1973) 23

Community-Service Broadcasting of Mid-America, Inc. v. FCC, 593 F.2d 1102 (D.C. Cir. 1978) (en banc) 51

Consolidated Edison Co. v. Public Service Comm'n,
447 U.S. 530 (1980) 26, 27-29

Dunn v. Blumstein,
405 U.S. 330 (1972) 25

Eastern R.R. Presidents Conf. v. Noerr Motor Freight, Inc., 365 U.S. 127 (1961) 17, 37

Elrod v. Burns,
427 U.S. 347 (1976) 22, 25

Erznoznik v. City of Jacksonville,
422 U.S. 205 (1975) 41, 42

First National Bank of Boston v. Bellotti,
435 U.S. 765 (1978) 16, 17, 29-30, 38-39, 41, 43

Frost v. Railroad Comm'n,
271 U.S. 583 (1926) 22

Gertz v. Robert Welch, Inc.,
418 U.S. 323 (1974) 17

Green v. Connally,
330 F. Supp. 1150 (D.D.C.), *aff'd mem.*,
404 U.S. 997 (1971) 23

Page

Greenberg v. Bolger,
497 F. Supp. 756 (E.D.N.Y. 1980) 52

Grosjean v. American Press Co.,
297 U.S. 233 (1936) 19

Harris v. McRae,
448 U.S. 297 (1980) 21, 39, 42-43

Healy v. James,
408 U.S. 169 (1972) 16, 19, 26

Henrico Professional Firefighters Ass'n v. Board of Supervisors, 649 F.2d 237 (4th Cir. 1981) 48

Illinois State Board of Elections v. Socialist Workers Party, 440 U.S. 173 (1979) 37

Johnson v. Robison,
415 U.S. 361 (1974) 2, 47

Liberty Lobby, Inc. v. Pearson,
390 F.2d 489 (D.C. Cir. 1968) 17

Linmark Assoc. v. Township of Willingboro,
431 U.S. 85 (1977) 21

Madison School District v. Wisconsin Employment Relations Comm'n, 429 U.S. 167 (1976) 22

Maher v. Roe,
432 U.S. 464 (1977) 21, 39, 42-43

McDaniel v. Paty,
435 U.S. 618 (1968) 22

McLucas v. DeChamplain,
421 U.S. 21 (1975) 9

Metromedia, Inc. v. San Diego,
453 U.S. 490 (1981) 42

Page

Mills v. Alabama,
384 U.S. 214 (1966) 16, 18

NAACP v. Alabama ex rel. Patterson,
357 U.S. 449 (1958) 19

NAACP v. Button,
371 U.S. 415 (1963) 17-18, 25

New York Times Co. v. Sullivan,
376 U.S. 254 (1964) 16-17

Perry v. Sindermann,
408 U.S. 593 (1972) 21

Perry Local Educators' Ass'n v. Holt,
652 F.2d 1286 (7th Cir. 1981), *consideration of jurisdiction postponed*, 454 U.S. 1140 (No. 81-896, argued October 13, 1982) 28

Pickering v. Board of Education,
391 U.S. 563 (1968) 22

Police Department v. Mosley,
408 U.S. 92 (1972) 14, 29

Powell v. McCormack,
395 U.S. 486 (1969) 48

Primus, In re,
436 U.S. 412 (1978) 6

Public Funds for Public Schools v. Byrne,
590 F.2d 514 (3d Cir.), *aff'd mem.*,
442 U.S. 907 (1979) 23

Schad v. Borough of Mount Ephraim,
452 U.S. 61 (1981) 27, 41, 42

Schneider v. State,
308 U.S. 27 (1939) 27

Page

Shapiro v. Thompson,
394 U.S. 618 (1969) 25

Shelton v. Tucker,
364 U.S. 479 (1960) 22

Sherbert v. Verner,
374 U.S. 398 (1963) 22, 23

Simon v. Eastern Kentucky Welfare Rights Organization,
426 U.S. 26 (1976) 5

Southeastern Promotions, Ltd. v. Conrad,
420 U.S. 546 (1975) 27

Speiser v. Randall,
357 U.S. 513 (1958) 19-21

Thomas v. Collins,
323 U.S. 516 (1945) 16, 18, 24-25

Thomas v. Review Board,
450 U.S. 707 (1981) 23, 42

Thornhill v. Alabama,
310 U.S. 88 (1940) 17

United Mine Workers v. Illinois State Bar Ass'n,
389 U.S. 217 (1967) 19

United States v. Chicago, M., St. P. & P.R.R.,
282 U.S. 311 (1931) 20

United States v. Harriss,
347 U.S. 612 (1954) 47

United States v. Raines,
362 U.S. 17 (1960) 9

Village of Schaumburg v. Citizens for a Better Environment, 444 U.S. 620 (1980) 26

Page

Weinberger v. Wiesenfeld,
420 U.S. 636 (1975) 2

Wieman v. Updegraff,
344 U.S. 183 (1952) 22

Williams v. Rhodes,
393 U.S. 23 (1968) 19, 25

Williams v. Zbaraz,
448 U.S. 358 (1980) 9

Wooley v. Maynard,
430 U.S. 705 (1977) 22

Zablocki v. Redhail,
434 U.S. 374 (1978) 39-40

United States Constitution:

First Amendment ..... *passim*

Fifth Amendment 2

Fourteenth Amendment 2

Statutes:

Internal Revenue Code of 1954 (Title 26,
United States Code):

Section 162(e) 13, 35-37, 50

Section 170 11

Section 170(c)(2) 5, 31

Section 170(c)(3) 8, 32

Section 170(c)(4) 8

Page

Section 501 ..... *passim*

Section 501(c)(3) ..... *passim*

Section 501(c)(4) 7

Section 501(c)(8) 8

Section 501(c)(10) 8

Section 501(c)(19) 7

Section 501(h) 7

Section 509 ..... 6, 39

Section 2055 ..... 5, 8

Section 2106 5

Section 2522 ..... 5, 8

Section 3121 5

Section 3306 5

Section 4911 7

Section 4945 39

Section 7428 ..... 4, 10-11, 50

28 U.S.C. § 1252 9

38 U.S.C. § 3402 49

44 U.S.C. § 1332 49

Congressional Budget Act of 1974,
P.L. No. 93-344, 88 Stat. 297 22-23

Page

Legislative Materials:

78 Cong. Rec. 5861 (1934) 31-32, 40

78 Cong. Rec. 5959 (1934) 32-33, 40

78 Cong. Rec. 7831 (1934) 33-34

H.R. Rep. No. 1447, 87th Cong., 2d Sess. (1962) 37

H.R. Rep. No. 94-658, 94th Cong., 1st Sess. (1975) 11

S. Rep. 1843, 87th Cong., 2d Sess. (1962) 36-37

S. Rep. No. 94-938, 94th Cong., 2d Sess. (1976) 11

U.S. Congress, Joint Committee on Internal Revenue Taxation, *Summary of New Provisions of the Internal Revenue Code of 1954 (H.R. 8300)* (1955) 34

Influencing Legislation by Public Charities, Hearing Before the House Committee on Ways and Means, 94th Cong., 2d Sess. (1976) 36

Other Authorities:

G. Bogert & G. Bogert, *Law of Trusts and Trustees* § 378 (rev. 2d ed. 1977) 6

Caplin & Timbie, *Legislative Activities of Public Charities,* 39 Law of Contemp. Prob. 183 (1975) 6, 37

Clark, *The Limitation on Political Activities: A Discordant Note in the Law of Charities,* 46 Va. L. Rev. 439 (1980) 37

Page

Garrett, *Federal Tax Limitations on Political Activities of Public Interest and Educational Organizations*, 59 Geo. L.J. 561 (1971) 31

Ginsburg, *Some Thoughts on Judicial Authority To Repair Unconstitutional Legislation*, 28 Cleveland St. L. Rev. 301 (1979) 51

Kalven, *The Concept of the Public Forum: Cox v. Louisiana*, 1965 Sup. Ct. Rev. 1 42

Note, *Regulating The Political Activity of Foundations*, 83 Harv. L. Rev. 1843 (1970) 31, 35-36

Note, *Unconstitutional Conditions*, 73 Harv. L. Rev. 1595 (1960) 44

2 *Restatement (Second) of the Law of Trusts* § 374 (1959) 6

IV *Scott on Trusts* § 374.4 (3d ed. 1967) 6

Surrey & McDaniel, *The Tax Expenditure Concept and the Budget Reform Act of 1974*, 17 B.C. Indust. & Com. L. Rev. 679 (1976) 23

Troyer, *Charities, Law-Making, and the Constitution: The Validity of the Restrictions on Influencing Legislation*, 31 N.Y.U. Inst. on Fed. Tax. 1415 (1973) 6

Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law*, 81 Harv. L. Rev. 1429 (1968) 19-20

IN THE

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October Term, 1982

No. 81-2338

DONALD T. REGAN, SECRETARY OF THE TREASURY, *et al.*,

Appellants,

v.

TAXATION WITH REPRESENTATION OF WASHINGTON,

Appellee.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF OF APPELLEE

STATEMENT OF THE CASE

Appellee Taxation with Representation of Washington ("Taxation") is a nonprofit charitable corporation, and as such it is dependent upon contributions for the support of its activities.[1] Its success in attracting contributions in turn depends largely on the availability of a government benefit in the form of tax deductions to donors who contribute to it. Solely because Taxation has chosen to exercise its First Amendment rights by engaging in substantial lobbying, gifts to it are not tax-deductible. Meanwhile, other groups, such as veterans' organizations, may receive tax-deductible gifts without laboring under a comparable restriction on their lobbying. It is this disparity in treat-

[1] Appellee has no parent companies, subsidiaries, or affiliates within the meaning of Rule 28.1.

ment which provides the basis for this challenge to the constitutionality of the lobbying restriction.[2]

Taxation was incorporated in 1977 under the District of Columbia Non-profit Corporation Act. (J.A. 27-34). The organization's articles of incorporation state that it is organized "[t]o promote charitable activities within the meaning of Section 501(c)(3) of the Internal Revenue Code of 1954." (J.A. 29). Soon after it was formed, Taxation filed an application for recognition of tax-exempt status as a charitable organization under section 501(c)(3) of the Internal Revenue Code, 26 U.S.C. § 501(c)(3). (J.A. 35-45). The application explained that Taxation intended to take over the lobbying and litigation activities which were being conducted by two other nonprofit corporations, Taxation with Representation and Taxation with Representation Fund. (J.A. 39). Taxation provided the following description of its intended lobbying activities:

> Taxation with Representation of Washington (TWRW) is a public interest organization that deals solely with federal tax issues. Its goal is to make sure that the general public is represented by skilled professionals when tax issues are under discussion in Congress, in the Executive Branch or before the courts.
>
> The tax laws are now so complex that ordinary citizens find it difficult to speak out intelligently

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[2]Since the challenged classification is created by federal statutes, the Fifth Amendment rather than the Fourteenth is controlling. It makes no difference that the Fifth Amendment does not contain a specific guarantee of equal protection of the laws, since "if a classification would be invalid under the Equal Protection Clause of the Fourteenth Amendment, it is also inconsistent with the due process requirement of the Fifth Amendment." *Johnson v. Robison*, 415 U.S. 361, 364 n.4 (1974). *Accord, Buckley v. Valeo*, 424 U.S. 1, 93 (1976); *Weinberger v. Wiesenfeld*, 420 U.S. 636, 638 n.2 (1975); *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954).

> on tax matters. TWRW seeks to ease the resulting problems by encouraging tax professionals to speak out on behalf of the public.
>
> TWRW seeks out persons who wish to represent the general public, including members of the tax bar, public finance economists, teachers of accounting and tax law and other tax specialists. It then helps them to prepare and publicize testimony and to follow up their presentation with informal contacts and discussions to insure that their message is heard. Particular attention is devoted to administrative proceedings and to legislative hearings at which the general public is not otherwise represented.

(J.A. 37). Taxation was denied the tax exemption it sought solely because the IRS found that the organization's "stated purposes include attempting to influence legislation, and legislative advocacy may constitute a substantial part of your activities." (J.A. 47).[3]

As applicable to Taxation, section 501(c)(3) may be viewed as containing four requirements. First, the organization must be "organized and operated exclusively" for charitable, educational, or other exempt purposes. As noted above, Taxation is so organized and would be operating in that manner, but for the denial of the exemption it sought. (J.A. 29).[4] Second, it must be shown that

[3]The government states that Taxation was "formed for the purpose of attempting to influence tax legislation." Govt. Brief at 10. *See also id.* at 49. The government thus overlooks the fact that Taxation's charitable purposes are "[r]elief of the poor, the distressed, and the underprivileged; and the defense of human and civil rights secured by law." (J.A. 29). Lobbying is one *means* by which these goals will be pursued. *See* pages 5-6 *infra*.

[4]Due to the denial of its application for a tax exemption, Taxation has not been able to commence its activities. Taxation with Representation Fund (now known as Tax Analysts) publishes the weekly journal *Tax Notes*, but it does no lobbying. In June 1980, Taxation with

"no part of the net earnings [of the organization] inures to the benefit of any private shareholder or individual." Once again, Taxation's articles of incorporation contain the required restriction. (J.A. 31). Third, a section 501(c)(3) group may "not participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of any candidate for public office." Taxation's articles of incorporation specifically prohibit such political activities (J.A. 31), and its application stated that it "will not seek to intervene in political campaigns." (J.A. 41).

Thus, the sole reason for denial of the section 501(c)(3) tax exemption sought by Taxation related to the fourth condition, which limits the availability of exemptions to groups "no substantial part of the activities of which is carrying on propaganda, or otherwise attempting, to influence legislation." Because lobbying constitutes a substantial part of Taxation's intended activities, the organization could not comply with section 501(c)(3) as written, and it brought this action pursuant to 26 U.S.C. § 7428 to have the lobbying restriction declared unconstitutional.[5]

Representation distributed all of its assets and liabilities to Tax Analysts and became inactive. If Taxation is successful in this action and obtains a section 501(c)(3) exemption, it will carry out the activities described in its application for exemption, including substantial lobbying in furtherance of its exempt purposes.

[5]The government states that Taxation has been denied section 501(c)(3) status in order to head off "wholesale public subvention of partisan interests" and in order to prevent charities like Taxation from engaging in "substantial partisan activities." Govt. Brief at 11, 15. These statements appear to be calculated to raise the specter of partisan political activities by charities, but, as already explained, such activities are specifically prohibited by a provision of section 501(c)(3) which is not challenged in this case, as well as by Taxation's articles of incorporation and its application for exempt status. (J.A. 31, 41).

The denial of section 501(c)(3) status to Taxation solely because of its intended lobbying greatly reduces its ability to raise funds. Under the Internal Revenue Code, the deductibility of donations for federal income, estate, and gift tax purposes depends on the recipient organization's compliance with a "no substantial lobbying" condition which is equivalent to that contained in section 501(c)(3). Code §§ 170(c)(2) (income tax); 2055(a)(2), 2106(a)(2) (estate tax); 2522(a)(2) (gift tax). Under these statutes, Taxation's failure to comply with the lobbying restriction has resulted in its exclusion from the Internal Revenue Service's "Cumulative List" of organizations entitled to receive tax-deductible donations. As this Court has noted, "appearance on the Cumulative List is a prerequisite to successful fund raising for most charitable organizations. Many contributors simply will not make donations to an organization that does not appear on the Cumulative List." *Bob Jones University v. Simon*, 416 U.S. 725, 729-30 (1974); *see id.* at 730 n.3; *Alexander v. "Americans United" Inc.*, 416 U.S. 752, 763-75 (1974) (Blackmun, J. dissenting).[6]

Just as the failure to comply with the lobbying restriction and the resulting denial of the opportunity to solicit gifts which will be tax-deductible to donors may seriously impair a charity's ability to raise funds, compliance with

[6]For simplicity, we will refer only to section 501(c)(3) in discussing the restriction on lobbying, although the most important consequences of failure to qualify under section 501(c)(3) are caused more immediately by the operation of the other statutes which incorporate the section 501(c)(3) lobbying restriction, particularly section 170(c)(2). As this Court observed in *Simon v. Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26, 29 n.1 (1976), "Section 501 is the linchpin of the statutory benefit system." In addition to being entitled to receive tax-deductible contributions, an organization which qualifies under section 501(c)(3) is exempt from federal unemployment and social security taxes. Internal Revenue Code §§ 3306(c)(8), 3121(b)(8)(B).

the restriction may make it difficult or impossible for a charitable group to carry out the mission for which it was formed.[7] Lobbying for its own sake would not be considered charitable *per se*. But lobbying, like litigation, *see In re Primus*, 436 U.S. 412 (1978), will often be an important element in the overall program pursued by a charitable group in attempting to achieve its purposes. The fact that lobbying is used as a means of promoting a charitable goal in no way alters the charitable character of the goal. G. Bogert & G. Bogert, *Law of Trusts and Trustees* § 378 (rev. 2d ed. 1977); IV *Scott on Trusts* § 374.4, at 2912 (3d ed. 1967); 2 *Restatement (Second) of the Law of Trusts* § 374, at 257, 260 (1959); Troyer, *Charities, Law-Making, and the Constitution: The Validity of the Restrictions on Influencing Legislation*, 31 N.Y.U. Inst. on Fed. Tax. 1415, 1422-23 (1973). Considering the pervasive role played by federal, state, and local legislation, many charities could not hope to put their programs into effect without attempting to influence legislation. *See* J.A. 25 (lobbying is an essential means of bringing about changes in federal tax policy); Brief of American Association of Museums, *et al.* at 5-6 (lobbying is necessary to the promotion of charitable goals in such areas as public health, assistance to the needy, and environmental protection); Caplin & Timbie, *Legislative Activities of Public Charities*, 39 Law & Contemp. Prob. 183, 197 (1975) ("many important charitable goals can be achieved only with the aid of legislation").

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[7] In this brief, the shorthand expression "charity" will be used to refer to a charitable, educational, religious, or similar group which qualifies for a tax exemption under section 501(c)(3) of the Internal Revenue Code and which is not a private foundation. *See* Code § 509(a). Such groups will also sometimes be referred to as "public charities."

Public charities other than churches may now elect to have the limitation on their lobbying set by Code sections 501(h) and 4911 rather than by the "substantiality" test of section 501(c)(3). *See* Govt. Brief at 38-39 n.20. Taxation has not elected to be covered by these provisions, nor does it intend to do so. (J.A. 18). This alternative method of determining the amount of lobbying which a charity may conduct has little if any relevance to this case, because all charities remain subject to either the section 501(c)(3) or the section 501(h) limitation. (J.S. App. 18a-19a n.6). As indicated by the various *amicus* briefs, both charities and veterans' groups believe that having their lobbying restricted by these statutes impairs or would impair their ability to carry out their exempt functions. Thus, Taxation and the *amici* charities oppose application of the restrictions to charities, and the *amici* veterans' groups oppose application of the restrictions to veterans' groups.[8]

In contrast to public charities such as Taxation, veterans' organizations are free to engage in unlimited lobbying in furtherance of their exempt purposes, and fraternal societies are also granted preferred status with respect to lobbying. *See* Internal Revenue Code §§ 501(c)(19),

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[8]The court of appeals expressed the view that the lobbying restriction is of limited practical effect because a "group such as Taxation can easily structure itself along dual lines, under both Sections 501(c)(3) and 501(c)(4) of the Code, using the latter organization only for lobbying purposes." (J.S. App. 34a). The court's statement had no support in the record, and it is incorrect. There are a number of disadvantages to the dual organization approach suggested by the court, and these are set out in the affidavit filed by Taxation in the district court (J.A. 20) and in the *amicus* brief filed by a number of charities in support of Taxation's position. *See* Brief of American Association of Museums, *et al.* at 12-21. For a description of the section 501(h) lobbying restriction and its impact on charities who elect to be covered by it, see *id* at 25-28.

170(c)(3), 2055, 2522 (veterans' organizations); §§ 501(c)(8), 501(c)(10), 170(c)(4), 2522 (fraternal societies).[9]

The court of appeals summarized the effect of the statutory provisions as follows:

> For purposes of this case, the crucial distinction promoted by Section 501 is between organizations that may not receive tax-deductible contributions if they lobby substantially, and organizations that may receive such contributions even if they do.
>
> * * *
>
> An organization such as Taxation may not receive tax-deductible contributions if it engages in "substantial" lobbying, but a qualifying veterans' organization may continue to receive tax-deductible contributions even if it lobbies as much and on as many issues as it chooses.

(J.S. App. 17a, 23a). The court found that this discrimination is unconstitutional:

> [T]he Code's discriminatory treatment of lobbying by veterans' organizations does not even satisfy the test of rationality, much less the heightened level of scrutiny appropriate here.

[9]Fraternal societies are accorded tax treatment which is slightly less favorable than that of veterans' groups. For example, such societies may receive bequests which are exempt from estate taxation under section 2055(a) only if they do not engage in substantial legislative activity, and tax-deductible gifts under section 170(c)(4) may be made only by individuals. Despite these slight variations, both veterans' groups and fraternal societies receive the substantial equivalent of an exemption under section 501(c)(3), but without restrictions on their freedom to lobby. Because veterans' groups conduct much more lobbying than do fraternal societies (*see* J.S. App. 23a-24a & n.11, 72a n.49), this brief will focus on them. Likewise, there will be no discussion of such groups as cemetary associations (*see* Govt. Brief at 48-49), which generally are not active in lobbying.

> The legislative history of the tax exemptions accorded veterans demonstrates absolutely no governmental interest whatsoever that is served by allowing such groups to conduct substantial lobbying with tax-deductible contributions.

(J.S. App. 66a).

In addition to making the equal protection argument on which it prevailed in the court of appeals, Taxation advanced a related but independent First Amendment challenge to the lobbying restriction imposed on charities. Taxation's alternative theory was that, even apart from the difference in treatment between charities and veterans' groups, the lobbying restriction contained in section 501(c)(3) violates the First Amendment rights of charities. While acknowledging that Taxation's argument "has some strength" (J.S. App. 32a), the majority rejected the First Amendment claim. (J.S. App. 34a). The dissenters also rejected the First Amendment claim, although for different reasons. (J.S. App. 87a-106a).[10]

The only relief sought by Taxation is a declaration that it is entitled to be recognized as an exempt organization under section 501(c)(3) of the Code. (J.A. 10). The government has never disputed Taxation's contention

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[10]Taxation raised the First Amendment argument in a Jurisdictional Statement on Cross-Appeal (No. 82-134), but this Court has not yet acted on that appeal. The First Amendment theory would nonetheless constitute a proper basis upon which this Court could declare section 501(c)(3) to be unconstitutional, since this case is on appeal under 28 U.S.C. § 1252, which brings the whole case up to this Court. *Williams v. Zbaraz*, 448 U.S. 358, 367-68 (1980); *McLucas v. DeChamplain*, 421 U.S. 21, 31 (1975); *United States v. Raines*, 362 U.S. 17, 27 n.7 (1960). In any event, the First Amendment and equal protection aspects of this case are so thoroughly intertwined that this Court should exercise its power to address the First Amendment issue. *See Brown v. Socialist Workers '74 Campaign Committee*, 103 S. Ct. 416 (1982).

that, if the lobbying restriction is unconstitutional, the granting of tax-exempt status would be the proper remedy. Nonetheless, the court of appeals' majority expressed the view that "[i]t seems evident that the legislative judgment expressed in Section 501(c) will be less disturbed by striking down the preferential treatment now accorded the lobbying of veterans' organizations than by extending that treatment to Section 501(c)(3) organizations." (J.S. App. 76a). However, the court of appeals did not decide the issue, at least in part because the veterans' groups which would be affected by an extension of the lobbying restriction had not been involved in the litigation. (J.S. App. 76a). Instead, the court remanded the case to the district court "with the instruction that it cure the constitutionally invalid operation of Section 501(c) after inviting veterans' organizations to participate in framing the relief." (J.S. App. 77a). Four veterans' groups – The American Legion, The Veterans of Foreign Wars of the United States, Disabled American Veterans, and Paralyzed Veterans of America – then sought to intervene, both in the court of appeals and in this Court, but intervention was denied. However, the four groups have filed briefs as *amici curiae* in this Court, taking the position that there is no constitutional violation, and that, if there is a violation, it should be cured by removing the lobbying restriction now applied to charities.[11]

[11] *Amicus* Veterans of Foreign Wars of the United States argues that the district court lacked jurisdiction because Taxation's claim is based on a constitutional challenge to section 501(c)(3). Brief at 4-14. The VFW takes the position that 26 U.S.C. § 7428 should be interpreted to exclude such a constitutional claim from the class of declaratory judgment actions authorized by the statute. However, there is nothing in the language of section 7428 or in its legislative history to indicate that the declaratory judgment procedure created in 1976 was meant to be limited to non-constitutional issues. The expressed intent of Congress was to overturn the result reached in *Bob Jones University v. Simon*, 416 U.S. 725 (1974), and *Alexander v. "Americans United" Inc.*, 416

SUMMARY OF ARGUMENT

This case raises an equal protection challenge to the regulation of First Amendment rights. Under sections 501 and 170 of the Internal Revenue Code, public charities cannot qualify to receive tax-deductible contributions if they engage in substantial lobbying. Charities must therefore choose between forgoing the exemption under section 501(c)(3) to which they would otherwise be entitled, which greatly impairs their ability to raise funds, and forgoing substantial lobbying, which may seriously impair their ability to promote their charitable purposes. Meanwhile, veterans' organizations may receive tax-deductible contributions even though they are subject to no similar restriction on their lobbying activities.

The government contends that the "rational basis" standard of review should be applied in this case, since in its view the lobbying restriction has only an incidental impact

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U.S. 752 (1974). Since *Americans United* was itself a challenge to the constitutionality of the lobbying restriction contained in section 501(c)(3), Congress certainly did not intend to foreclose the type of action brought by Taxation. Moreover, the exception which the VFW suggests should be read into the statute conflicts with the congressional intent to provide an applicant with a speedy and certain route by which to obtain an authoritative determination on its claimed entitlement to exempt status. *See, e.g.*, H.R. Rep. No. 94-658, 94th Cong., 1st Sess. 286 (1975), *reprinted in* 1976 U.S. Code Cong. & Admin. News 2897, 3182 (the declaratory judgment provision "is intended to facilitate relatively prompt judicial review of the specified types of exempt organization issues"); S. Rep. No. 94-938, 94th Cong., 2d Sess. 588 (1976), *reprinted in* 1976 U.S. Code Cong. & Admin. News 3439, 4012. Taxation exhausted its administrative remedies (J.A. 47-48, 50), and filed suit only after it received "a determination by the Secretary" which denied its application. Nothing in section 7428 deprives the courts of jurisdiction simply because the administrative denial of exempt status was based on an unconstitutional statutory provision. It is also worth noting that the government, which will always be the defendant in a section 7428 action, has never questioned the interpretation of the statute under which the district court and the court of appeals exercised jurisdiction.

on the exercise of First Amendment rights. However, this approach overlooks the fact that the restriction substantially impairs expressive activity – indeed, it has no other purpose.

Several independent lines of authority establish the appropriateness of strict judicial review in this case. First, the lobbying restriction imposes an "unconstitutional condition" on the exercise of First Amendment rights. The government does not deny that it would be unconstitutional for Congress to prohibit lobbying or to penalize those who engage in it. Since the government may not do indirectly what the Constitution forbids it to do directly, the withholding of tax benefits to accomplish the same end is equally impermissible.

Second, there is no requirement that Taxation establish an independent First Amendment violation in order to be entitled to have a strict standard of review applied. It is enough that the organization's First Amendment activities are "regulated" by the statute. *Citizens Against Rent Control/Coalition for Fair Housing v. City of Berkeley,* 454 U.S. 290 (1981). Moreover, the statutes governing tax-exempt groups are both "content-based" and "speaker-based." The First Amendment leaves a legislature very little leeway when a statute discriminates among speakers based on who they are or what they intend to say. Section 501(c) favors one category of speakers (veterans) over another (charities), and the reach of the statutory prohibition is defined by the content of the speech in which each group wishes to engage. Moreover, the only speech which is forbidden is advocacy concerning legislation, a form of political expression which lies at the core of First Amendment freedoms.

The legislative history of the lobbying restriction is very

sparse. What little is known about Congress' motives in establishing the challenged discrimination against lobbying by charities falls far short of the compelling government interest required by this Court's precedents. The government relies on *Cammarano v. United States,* 358 U.S. 498 (1959), which it says demonstrates that a policy of "neutrality" toward lobbying underlies the statute. However, the fact that no restriction is imposed on lobbying by veterans' groups is alone sufficient to demonstrate that the notion of "neutrality" toward lobbying is an illusion. Moreover, after *Cammarano* was decided Congress overruled it legislatively, recognizing that it is in the national interest to *encourage* interested parties to lobby Congress and other legislative bodies concerning legislation which is under consideration. Section 162(e) of the Internal Revenue Code, which was passed in 1962, allows business taxpayers to take deductions for almost all of their lobbying, and the same policy which underlies section 162(e) calls for charities to be allowed to inform legislators about how their charitable work will be affected by legislative proposals.

The government speculates that the lobbying restriction is designed to prevent unspecified "abuses' by charities which might lead to the diversion of charitable funds to serve private ends. However, if that is the purpose of the restriction, the statute is both underinclusive and overinclusive.

The restriction does not address the possibility of "abuses" by veterans' groups, nor does it do anything to prevent improper activities which involve any technique other than lobbying. On the other hand, charities are deprived of the benefits of section 501(c)(3) status even if no improper activities have taken place — substantial lob-

bying solely in furtherance of proper charitable goals is not allowed. Moreover, a charity which conducts substantial lobbying does not lose only a proportionate share of the benefits of section 501(c)(3) status. Unlike the business taxpayers in *Cammarano*, who lost deductions only for the amounts actually spent on lobbying, a charity which cannot qualify under section 501(c)(3) because of substantial lobbying loses, for *all* contributions made to it, the right to offer deductibility to donors. The correlation between the ends said to be served by the statute and the means used is nowhere near as precise as is required when First Amendment rights are being regulated.

Another line of argument presented in support of the statute attempts to demonstrate that there are differences between charities and veterans' groups which justify allowing only the latter to conduct substantial lobbying. However, the alleged differences either do not exist at all, or do not have any constitutional significance. Thus, although veterans' groups are required to direct their lobbying solely toward achieving charitable ends, charities are similarly restricted. Veterans' groups may not engage in partisan political activity, but neither may charities. Veterans' groups carry out socially beneficial activities, but the applicable statutes require no less of charities.

If this statutory classification is to be sustained, it must be upheld on the theory that Congress has a right to grant a preferred status with regard to the exercise of First Amendment rights to one group of speakers relative to another. Yet that is precisely the sort of determination that is forbidden by such decisions as *Police Department v. Mosley*, 408 U.S. 92 (1972), and *Carey v. Brown*, 447 U.S. 455 (1980). Congress has a great deal of freedom in deciding what benefits constitute an appropriate reward

for those who have served in the armed forces, but enhanced First Amendment rights cannot properly be used as a type of currency to discharge the nation's debt to its veterans.

ARGUMENT

I. THE RESTRICTION ON LOBBYING WHICH IS AT ISSUE IN THIS CASE IS SUBJECT TO AN EXACTING STANDARD OF JUDICIAL REVIEW.

The discriminatory regulation of lobbying by charities which is challenged by Taxation in this case must be measured against the rigorous standard of review which is traditionally applied in First Amendment cases. As this Court recently stated in *Citizens Against Rent Control/ Coalition for Fair Housing v. City of Berkeley,* 454 U.S. 290, 294 (1981), "regulation of First Amendment rights is always subject to exacting judicial review." *See id.* at 298. The applicability of such a standard in this case is of special significance, since the government virtually concedes that the discrimination against charities can be sustained only if it is measured against the less demanding "rational basis" standard. Indeed, the government limits its discussion of strict scrutiny to the bald assertion in a footnote that "the statutes in question could be upheld even under a heightened standard of judicial scrutiny." Govt. Brief at 47 n.27. Since the government makes no real effort to show that such a standard could be met, and the record in this case demonstrates conclusively that no compelling government interest exists and that the means chosen are not the least restrictive which are available, the government's appeal must fail if this Court applies the more demanding standard of review.

A. Lobbying Is Protected By The First Amendment.

Although the government does not specifically discuss the issue in its brief, there can be no doubt that the court of appeals was correct in holding that "lobbying comes within the protection of the First Amendment." (J.S. App. 29a). Free discussion of governmental affairs has long been recognized as "indispensable to decisionmaking in a democracy." *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 777 (1978). *Mills v. Alabama*, 384 U.S. 214, 218-19 (1966). Moreover, "the practice of persons sharing common views banding together to achieve a common end is deeply embedded in the American political process." *Citizens Against Rent Control v. City of Berkeley, supra*, 454 U.S. at 294.[12]

No organization may qualify for tax exemption under section 501(c)(3) if a substantial part of its activities consists of "carrying on propaganda, or otherwise attempting, to influence legislation." Whatever uncertainties there may be as to the reach of the First Amendment at its extremities, presentation of information to legislators on issues of public policy is at the very core of the activities which that Amendment shields from governmental restraint. Our society is one which has made "a profound

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[12]Although Taxation bases its case on various First Amendment freedoms — including speech, association, and petition — a separate discussion of each claimed right will not be attempted. "It was not by accident or coincidence that the rights to freedom in speech and press were coupled in a single guaranty with the rights of the people peaceably to assemble and to petition for redress of grievances. All these, though not identical, are inseparable. They are cognate rights . . . and therefore are united in the First Article's assurance." *Thomas v. Collins*, 323 U.S. 516, 530 (1945). *See also Citizens Against Rent Control v. City of Berkeley, supra*, 454 U.S. at 300 (the right of association and the right of expression "overlap and blend"); *Healy v. James*, 408 U.S. 169, 181 (1972).

national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open." *New York Times Co. v. Sullivan,* 376 U.S. 254, 270 (1964). *See Buckley v. Valeo,* 424 U.S. 1, 47-49 (1976). That commitment springs from the realization that there is no such thing as a false idea, *Gertz v. Robert Welch, Inc.* 418 U.S. 323, 339 (1974), and that only the freest competition among ideas adequately provides a basis for the resolution of public questions. *Citizens Against Rent Control v. City of Berkeley, supra,* 454 U.S. at 295. "Freedom of discussion, if it would fulfill its historic function in this nation, must embrace all issues about which information is needed or appropriate to enable the members of society to cope with the exigencies of their period." *First National Bank of Boston v. Bellotti, supra,* 435 U.S. at 776, *quoting Thornhill v. Alabama,* 310 U.S. 88, 102 (1940).

The activities which the government claims a right to regulate are an essential part of the process by which citizens bring to the attention of lawmakers their support for, objections to, or ideas concerning existing or proposed legislation. "While the term 'lobbyist' has become encrusted with invidious connotations, every person or group engaged . . . in trying to persuade Congressional action is exercising the First Amendment right of petition." *Liberty Lobby, Inc. v. Pearson,* 390 F.2d 489, 491 (D.C. Cir. 1968) (Burger, J.). *Eastern R.R. Presidents Conf. v. Noerr Motor Freight, Inc.,* 365 U.S. 127, 137-38 (1961); *California Motor Transport Co. v. Trucking Unlimited,* 404 U.S. 508, 510-11 (1972). The free exchange of ideas protected by the First Amendment includes the opportunity to persuade, rather than merely to set forth facts or engage in abstract discussion. *Buckley v. Valeo, supra,* 424 U.S. at 14-15, 48; *Mills v. Alabama, supra,* 384 U.S. at 219; *NAACP v. Button,* 371 U.S. 415, 437

(1963); *Thomas v. Collins*, 323 U.S. 516, 537 (1945). Thus, the district court and the court of appeals correctly concluded that Taxation's lobbying activities are clearly protected by the First Amendment. (J.S. App. 5a, 29a).

B. A Strict Standard Of Review Should Be Applied Because Section 501(c)(3) Abridges Taxation's First Amendment Rights By Placing An Unconstitutional Condition Upon Their Exercise.

The parties are in agreement that the lobbying restriction must be measured against a strict standard of review if it directly infringes on Taxation's First Amendment rights. Govt. Brief at 11, 24, 29. The crux of the government's argument that the discriminatory lobbying regulation at issue in this case need only be shown to be supported by a rational purpose is the assertion that it has only an "indirect impact upon the exercise of a constitutionally recognized right." Govt. Brief at 18. In the government's view, tax exemptions "granted to certain organizations and withheld from others are a matter of legislative grace, not of constitutional entitlement." *Id.* at 24. Thus, argues the government, "Congress need only show that its decision to encourage a particular activity or interest is a rational means to a legitimate governmental end." *Id.*

The government places great emphasis on the fact that section 501(c)(3) does not flatly prohibit Taxation from engaging in efforts to influence legislation which would advance its charitable purposes. It correctly notes that the statute declares that such efforts, if substantial, will make the organization ineligible for the government assistance to which it would otherwise be entitled. However, the

government's use of an indirect mechanism for preventing lobbying, instead of imposing an outright prohibition, does not resolve the constitutional issues presented. It has been held time and again by this Court that First Amendment freedoms are protected not only against heavy-handed frontal attack, but also from being stifled by more subtle governmental interference. *Bates v. City of Little Rock*, 361 U.S. 516, 523 (1960); *Healy v. James*, 408 U.S. 169, 183 (1972); *Williams v. Rhodes*, 393 U.S. 23, 41 (1968) (Harlan, J., concurring in the result); *United Mine Workers v. Illinois State Bar Ass'n*, 389 U.S. 217, 222 (1967); *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 461 (1958). Revenue laws which penalize the exercise of First Amendment rights are subject to the same strictures. *Grosjean v. American Press Co.*, 297 U.S. 233 (1936). Nor may the government grant or withhold tax privileges in a manner which interferes with the exercise of First Amendment rights. *Speiser v. Randall*, 357 U.S. 513 (1958). *See Big Mama Rag, Inc. v. United States*, 631 F.2d 1030 (D.C. Cir. 1980) (the discriminatory denial of tax exemptions may violate the First Amendment).

The particular form of interference that is involved here is often called an "unconstitutional condition." This Court has summarized the controlling principle of law in this fashion:

> [T]he right to continue the exercise of a privilege granted by the state cannot be made to depend upon the grantee's submission to a condition prescribed by the state which is hostile to the provisions of the Federal Constitution.

United States v. Chicago, M., St. P. & P.R.R., 282 U.S. 311, 328-29 (1931). Thus, "whatever an express constitutional provision forbids government to do directly it equally for-

bids government to do indirectly." Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law*, 81 Harv. L. Rev. 1429, 1445-46 (1968).

Speiser v. Randall, supra, involved facts strikingly similar to those presented in this case. There, honorably discharged World War II veterans sought the benefit of the veterans' property tax exemption provided in the California constitution, but declined to subscribe to the required oath that they did not advocate the overthrow of the government. This Court held that conditioning the tax benefit on taking the oath was unconstitutional:

> It cannot be gainsaid that a discriminatory denial of a tax exemption for engaging in speech is a limitation on free speech. . . . To deny an exemption to claimants who engage in certain forms of speech is in effect to penalize them for such speech. Its deterrent effect is the same as if the State were to fine them for this speech. The appellees are plainly mistaken in their argument that, because a tax exemption is a "privilege" or "bounty," its denial may not infringe speech.

357 U.S. at 518.

The government responds to *Speiser* and the line of authority it represents by citing *Cammarano v. United States*, 358 U.S. 498 (1959). *Cammarano* is discussed *infra* at pages 35-37 with respect to the government's reliance on the decision as allegedly stating the congressional purpose underlying the lobbying restriction. To the extent that the government argues that *Cammarano* justifies applying the "rational basis" standard of review in this case (*see* Govt. Brief at 12-14, 19-27), that reliance is also misplaced. This Court's conclusion in *Cammarano* that the regulation at issue there was "not 'aimed at the suppression of

dangerous ideas,'" 358 U.S. at 513, *quoting Speiser v. Randall, supra,* 357 U.S. at 519, was explicitly based on the nondiscriminatory nature of the regulation. Because the classification challenged in this case discriminates against charities and in favor of veterans' groups, it is not shielded by *Cammarano*. Moreover, because the restriction placed on charitable lobbying by section 501(c)(3) is intended to and does inhibit certain expression by charities, it must be subjected to strict judicial review. *See, e.g., Linmark Assoc. v. Township of Willingboro,* 431 U.S. 85, 93-94 (1977). *Cammarano* is also distinguishable because the taxpayers there were denied tax benefits only to the extent they actually spent money on lobbying. The result would have been different if there had been the disproportionate penalty which is imposed on charities under section 501(c)(3). Charities which engage in substantial lobbying are denied the right to receive *any* tax-deductible donations. *See Harris v. McRae,* 448 U.S. 297, 317 n.19 (1980); *Maher v. Roe,* 432 U.S. 464, 474-75 n.8 (1977); *Cammarano v. United States, supra,* 358 U.S. at 515 (Douglas, J., concurring). *Speiser* represents not an

Speiser represents not an aberration, but the application of a constitutional principle to which this Court has consistently adhered, as is apparent from *Perry v. Sindermann,* 408 U.S. 593, 597 (1972):

> For at least a quarter-century, this Court has made clear that even though a person has no "right" to a valuable governmental benefit and even though the government may deny him the benefit for any number of reasons, there are some reasons upon which the government may not rely. It may not deny a benefit to a person on a basis that infringes his constitutionally protected interests — especially, his interest in freedom of speech.

Accord, McDaniel v. Paty, 435 U.S. 618, 626 (1978); *Madison School District v. Wisconsin Employment Relations Comm'n,* 429 U.S. 167, 175 (1976); *Pickering v. Board of Education,* 391 U.S. 563, 568 (1968); *Sherbert v. Verner,* 374 U.S. 398, 404-05 (1963); *Shelton v. Tucker,* 364 U.S. 479, 485-86 (1960); *Wieman v. Updegraff,* 344 U.S. 183, 192 (1952); *Frost v. Railroad Comm'n,* 271 U.S. 583, 593 (1926) ("In reality, the carrier is given no choice, except a choice between the rock and the whirlpool, – an option to forego a privilege which may be vital to his livelihood, or to submit to a requirement which may constitute an intolerable burden."). Moreover, members of this Court have observed that its decisions "have prohibited conditions on public benefits, in the form of jobs or otherwise, which dampen the exercise generally of First Amendment rights, however slight the inducement to the individual to forsake those rights." *Elrod v. Burns,* 427 U.S. 347, 358 n.1 (1976) (plurality opinion). *See also Abood v. Detroit Board of Education,* 431 U.S. 209, 233-34 (1977); *Wooley v. Maynard,* 430 U.S. 705, 715 (1977).

Therefore, for purposes of constitutional analysis, the withholding of the advantages of section 501(c)(3) status is no different from the withholding of a direct government grant to which an organization would be entitled, but for its lobbying. Any program of government assistance can be drafted as either a tax expenditure or as a direct spending program. Thus, the indirect aid provided to charities and other exempt organizations through the device of tax-deductibility for contributions is a system of "tax expenditures," which is the functional, financial, and constitutional equivalent of a direct government payment.[13] As

[13]In fact, under the procedures adopted by the Congressional Budget Act of 1974, P.L. No. 93-344, 88 Stat. 297, the deductions taken by taxpayers for charitable contributions are evaluated for their

such, it may not be withheld to penalize the exercise of First Amendment rights.

The "unconstitutional condition" doctrine was recently restated and applied by this Court in *Thomas v. Review Board*, 450 U.S. 707 (1981). Mr. Thomas had been denied state unemployment compensation benefits after he had voluntarily left his employment because of religious convictions. This Court held that "the coercive impact on Thomas" was indistinguishable from that found to be unconstitutional in *Sherbert v. Verner, supra.* Although the compulsion to which Thomas was subjected was characterized as "indirect" because it took the form of denial of a government benefit, 450 U.S. at 717-18, this Court concluded that the infringement upon free exercise was substantial. *Id.* at 718. The state was required to justify the burden on religious practice "by showing that it is the least restrictive means of achieving some compelling state interest." *Id.* Although this case involves the rights of expression, petition, and association rather than free exercise, and tax exemption instead of unemployment benefits, the constitutional standard remains the same. Accordingly, the government is in error in its contention that the lobbying restriction does not penalize Taxation's exercise of First Amendment rights. The restriction may be sustained only if it is necessary to achieve a compelling governmental purpose and is a narrowly drawn as possible.

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impact on the budget just as direct government payments would be. *See generally* Surrey & McDaniel, *The Tax Expenditure Concept and the Budget Reform Act of 1974*, 17 B.C. Indust. & Com. L. Rev. 679 (1976). This Court has also recognized the equivalence of direct grants and tax benefits for constitutional purposes. *Committee for Public Education and Religious Liberty v. Nyquist*, 413 U.S. 756, 790-91 (1973) (declaring a tax benefit system invalid under the Establishment Clause). *See also Public Funds for Public Schools v. Byrne*, 590 F.2d 514 (3d Cir.), *aff'd mem.*, 442 U.S. 907 (1979); *Green v. Connally*, 330 F. Supp. 1150, 1164-65 (D.D.C.), *aff'd mem.*, 404 U.S. 997 (1971).

C. Because The Equal Protection Claim Presented In This Case Involves Government Regulation Of First Amendment Rights, Only An Exacting Standard Of Review Would Be Appropriate Even If No Independent First Amendment Claim Could Be Established.

Even if Taxation had not shown an abridgment of its First Amendment rights, *Citizens Against Rent Control v. City of Berkeley, supra*, requires that a strict standard of judicial review be applied in deciding the equal protection issue, since First Amendment rights unquestionably are regulated by section 501(c)(3). In that case, this Court began its analysis by noting that it was undisputed that the ordinance at issue there had "an impact on First Amendment rights." 454 U.S. at 294. Here, the government does not deny that section 501(c)(3) has an impact on First Amendment rights, nor could it do so in light of the fact that on its face the statute directs charities to refrain from substantial lobbying if they wish to enjoy the statute's benefits. Moreover, the decision in *Citizens Against Rent Control* makes it clear that "regulation of First Amendment rights is always subject to exacting judicial review." 454 U.S. at 294. *See id.* at 298. The government cannot deny that lobbying by charities is at least "regulated" by the statute, even though it presumably does not agree that the regulation oversteps the bounds of the First Amendment.

Even prior to *Citizens Against Rent Control*, the decisions of this Court required that strict scrutiny be utilized when First Amendment rights are regulated. It has long been established that First Amendment rights of the type involved in this case occupy a preferred place in our system of government. *Thomas v. Collins, supra*, 323 U.S.

at 530. Accordingly, because the discrimination here involves these fundamental rights, it can be sustained only if shown to be necessary to promote a compelling government interest. *Dunn v. Blumstein*, 405 U.S. 330, 335-37 (1972); *Shapiro v. Thompson*, 394 U.S. 618, 634 (1969); *Williams v. Rhodes, supra*, 393 U.S. at 31; *see Elrod v. Burns, supra*, 427 U.S. at 362; *NAACP v. Button, supra*, 371 U.S. at 438.

Carey v. Brown, 447 U.S. 455 (1980), illustrates the manner in which this Court has traditionally decided what standard of review should be applied in an equal protection case implicating the exercise of First Amendment rights. That case involved a statute which prohibited some, but not all, picketing of residential property, and the Court applied the rigorous standard of judicial review:

> When government regulation discriminates among speech-related activities in a public forum, the Equal Protection Clause mandates that the legislation be finely tailored to serve substantial state interests, and the justifications for any distinctions it draws must be carefully scrutinized.

447 U.S. at 461-62.

Nonetheless, the government argues that section 501(c)(3) should not be reviewed under the standard traditionally applied in First Amendment cases because the statute does not go so far as to impose a flat prohibition on lobbying by charities. Govt. Brief at 27-28 & n.13. According to the government, the statute should be measured against a standard of rationality because it merely penalizes lobbying (by withholding the benefits of a section 501(c)(3) tax exemption) rather than prohibiting it altogether. However, as discussed above at pages 18-23,

this Court repeatedly has held that a penalty imposed on the exercise of a First Amendment right must be evaluated no differently than a more direct interference with its exercise.

Moreover, the distinction which the government would like to make between "prohibitions" and "lesser" restrictions is little more than an exercise in semantic gameplaying and is of no constitutional significance, as a number of the decisions of this Court demonstrate. For example, in *Healy v. James, supra,* there was no prohibition on free speech activities, merely a university's withholding of official recognition for a student group. Students remained free to undertake expressive activities as individuals, and there were no restrictions at all on their freedom to get together in groups off campus. 408 U.S. at 182-83. Similarly, the regulation at issue in *Consolidated Edison Co. v. Public Service Comm'n,* 447 U.S. 530 (1980), applied only to bill inserts concerning controversial issues of public policy; all other avenues of expression remained unrestricted. And in *Village of Schaumburg v. Citizens for a Better Environment,* 444 U.S. 620 (1980), charitable organizations were restricted only as to one form of activity – the raising of funds through door-to-door solicitation – and such solicitation was only regulated, not prohibited entirely. *See also Citizens Against Rent Control v. City of Berkeley, supra,* 454 U.S. at 304 (White, J., dissenting). Despite the absence in these cases of anything that could fairly be described as an "absolute prohibition" on expressive activity, *see* Govt. Brief at 27-28 n.13, in each of them this Court applied the traditional, strict standard of review used in First Amendment cases.

Stated another way, the government's argument is similar to the assertion that the regulation of speech in one

forum does not trigger strict judicial review if the would-be speaker has access to some alternative forum. However, when arguments along these lines have been presented to this Court, they have been uniformly rejected. Thus, in *Schneider v. State,* 308 U.S. 147, 163 (1939), this Court held that "one is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place." *Schneider* was applied and reaffirmed in *Southeastern Promotions, Ltd. v. Conrad,* 420 U.S. 546 (1975), where a promoter challenged the decision of the City of Chattanooga to refuse use of a city-controlled theater for the play "Hair." The Court held that whether the promoter might have used some other, privately-owned theater in the city for the production was "of no consequence." *Id.* at 556. Likewise, in *Schad v. Borough of Mount Ephraim,* 452 U.S. 61 (1981), this Court found a prohibition of live entertainment unconstitutional, even though such entertainment was available to residents who were willing to travel to nearby communities. *See also id.* at 78 (Blackmun, J., concurring). These precedents, and the similar ones cited above, demonstrate that section 501(c)(3) must be measured against the strict standard of review applied in First Amendment cases, because it regulates the exercise of Taxation's First Amendment rights.

D. The Regulation Of Speech Which Is Challenged In This Case Is Content-Based, And Therefore It Should Be Subjected To An Especially Stringent Standard Of Review.

The First Amendment's hostility to content-based regulation of speech is indisputable. *See, e.g., Consolidated Edison Co. v. Public Service Comm'n, supra,*

447 U.S. at 537. The only reason given by the government in denying that section 501(c)(3)'s restriction on lobbying is content-based is the assertion that the "limitation upon lobbying activities is neutral as to the points of view appellee would espouse." Govt. Brief at 27. *See id.* at 23 n. 10 ("these limitations . . . do not 'penalize' appellee for the content of its advocacy"). However, this argument must fail because, even if the restriction is "viewpoint" neutral, it is still be "content-based" because the reach of the regulation is defined in terms of the content of speech (*i.e.*, it applies only to advocacy concerning legislation). *See Carey v. Brown, supra,* 447 U.S. at 462 ("it is the content of the speech which determines whether it is within or without" the regulation).[14]

This Court's decision in *Consolidated Edison Co. v. Public Service Commission, supra,* demonstrates that a broad restriction on speech about a particular subject is "content-based" even if it is neutral as to the points of view expressed. In *Consolidated Edison,* the Public Service Commission defended its ban on a utility's use of bill inserts to proselytize on controversial issues such as nuclear

[14]Even if a truly "neutral" subject-matter restriction would not be considered "content-based," the classification challenged here is not neutral, for it favors veterans' groups over charities. When discrimination is based on the identities of the speakers, even in a manner which appears to be neutral as to the viewpoints expressed, viewpoint discrimination is almost always to be found beneath the surface. As the United States Court of Appeals for the Seventh Circuit recently observed, "speech restrictions keyed to the identity of the speaker are always scrutinized strictly" because "they almost invariably are not neutral with respect to the viewpoints they tend to disfavor. Indeed, the fact that the Supreme Court has never distinguished sharply between speaker discrimination and impermissible subject matter restrictions . . . itself tends to indicate that the same fundamental evil underlies both." *Perry Local Educators' Ass'n v. Hohlt,* 652 F.2d 1286, 1295 (1981), *consideration of jurisdiction postponed,* 454 U.S. 1140 (No. 81-896, argued October 13, 1982).

power by pointing out that the ban applied "to all discussion of nuclear power, whether pro or con, in bill inserts." *Id.* at 537. Despite the fact that the regulation did not favor either side of a political controversy, this Court treated it as content-based:

> The First Amendment's hostility to content-based regulation extends not only to restrictions on particular viewpoints, but also to prohibition of public discussion of an entire topic.

447 U.S. at 537. *See also Carey v. Brown, supra,* 447 U.S. at 462 & n.6 (statute was viewpoint-neutral, but it discriminated on the basis of the subject matter of the message and therefore had to be considered content-based).

A line of cases which applies the very rigorous standard of review which is applicable here began with *Police Department v. Mosley, supra,* where this Court stated:

> Once a forum is opened up to assembly or speaking by some groups, government may not prohibit others from assembling or speaking on the basis of what they intend to say. Selective exclusions from a public forum may not be based on content alone, and may not be justified by reference to content alone.

408 U.S. at 96. This principle was restated in *First National Bank of Boston v. Bellotti, supra*:

> In the realm of protected speech, the legislature is constitutionally disqualified from dictating the subjects about which persons may speak and the speakers who may address a public issue. *Police Dept. of Chicago v. Mosley,* 408 U.S. 92, 96 (1972). If a legislature may direct

> business corporations to "stick to business," it may also limit other corporations – religious, charitable or civic – to their respective "business" when addressing the public. Such power in government to channel the expression of views is unacceptable under the First Amendment.

435 U.S. at 784-85 (footnote omitted). *Carey v. Brown, supra,* is to the same effect. 447 U.S. at 471 (statute held to be unconstitutional because it "discriminates among pickets based on the subject matter of their expression"). Under these precedents, the lobbying restriction is "content-based," and thus it must be subjected to the very strict level of constitutional scrutiny applied to such restrictions.

II. THE DISCRIMINATION AGAINST LOBBYING BY CHARITIES DENIES TAXATION THE EQUAL PROTECTION OF THE LAWS.

In this case, the line drawn in section 501(c), which allows veterans' organizations to receive tax-deductible contributions and to lobby virtually without limitation, while denying that freedom of expression to charitable organizations, is unsupported by any legitimate governmental interest. (J.S. App. 66a). Even more clearly, the *compelling* interest required by applicable law cannot be demonstrated.

The government attempts to defend the disparity in treatment accorded lobbying by charities on the one hand, and that by veterans' groups on the other, by contending that it "is a rational means of furthering the underlying congressional purpose of providing tax benefits to those organizations worthy of receiving them" and that it

"derives also from the congressional policy, sharply defined in many contexts, against the use of large private contributions to distort the legislative process." Govt. Brief at 31. However, the legislative history in no way supports the government's assertions, nor would those reasons suffice if they were the basis for the discrimination.

A. The History Of The Restriction.

As described by the government, the restriction on lobbying by charities dates back to 1934. Govt. Brief at 16-17. Despite its frequent characterizations of what it believes the statute was designed to achieve, the government does not challenge the court of appeals' conclusion that the history "is sparse indeed." (J.S. App. 49a & n.31). The commentators are also in agreement that Congress never gave any clear explanation of the purpose for the restriction on lobbying by charities. Note, *Regulating the Political Activity of Foundations,* 83 Harv. L. Rev. 1843, 1845 (1970); Garrett, *Federal Tax Limitations on Political Activities of Public Interest and Educational Organizations,* 59 Geo. L.J. 561, 564 (1971).[15]

The Senate Finance Committee proposed adding to the tax code the limitation that no group would qualify under what is now section 170(c)(2) if "participation in partisan politics" or "carrying on propaganda, or otherwise attempting to influence legislation" constituted a substantial part of its activities. 78 Cong. Rec. 5861 (1934). Senator Harrison, Chairman of the Finance Committee, observed that the amendment, as written, was deficient because it

[15]Perhaps even more significantly, there is no legislative history at all which explains why veterans' groups are *not* subject to any restriction on their lobbying.

applied to charities but not to war organizations (veterans' groups) receiving tax-deductible contributions under what is now section 170(c)(3). *Id.* Senator Harrison expressed the view that all organizations receiving contributions should be treated similarly with respect to lobbying. Senator Reed observed that a contribution to the National Economy League should not be deductible "if it is a selfish one made to advance the personal interests of the giver of the money," but he felt that the amendment as written went much further than the committee intended to go. Senator Couzens interjected that such groups as "the tuberculosis societies and the children's welfare societies" would not be affected because their lobbying would not be substantial. Senator Reed objected:

> I am not so sure. Take the case of those who are urging the adoption of the child-labor amendment: certainly they are not acting from selfish motives, and yet almost their entire activity is an effort to influence legislation.

With the discussion at this stage of irresolution, the Senate passed over the proposed amendment and went on to other business.

When the proposed amendment was next considered, it was passed by the Senate. 78 Cong. Rec. 5959. Before the voice vote was taken, Senator Harrison responded as follows to Senator Couzens' suggestion that the language might need to be changed:

> I may say to the Senate that the attention of the Senate Committee was called to the fact that there are certain organizations which are receiving contributions in order to influence legislation and carry on propaganda. The committee thought there ought to be an amendment which would stop

> that, so that is why we have put this amendment in the bill.

Senator Reed responded:

> Mr. President, I do not think the committee is proud of the language in which this amendment is couched. I know that the legislative drafting counsel who drew it expressed no pride whatever in their product; but I agree with the Senator from Michigan [Senator Couzens] that if the amendment shall be agreed to we will have from now until the conference to study the subject and prepare better phraseology.

The amendment was then passed without further discussion, save for a comment by Senator LaFollette that contributions to charities should not be deductible under any circumstances.

There was no further debate on the lobbying restriction, so far as Taxation is aware. As described by the government (Govt. Brief at 36-37 & n. 18), the only change made from the language originally proposed by the Senate Finance Committee was the deletion of the reference to "participation in partisan politics." This deletion was made at the request of the House conferees, who explained their reasons as follows:

> The Senate denied a deduction for contributions made to certain organizations, a substantial part of the activities of which was participation in partisan politics or carrying on propaganda or otherwise attempting to influence legislation. We were afraid this prohibition was too broad, and we succeeded in getting the Senate conferees to eliminate organizations, a substantial part of the activities of which was participation in partisan politics.

78 Cong. Rec. 7831. The present restriction on political activities by charities (which is not challenged in this litigation) was not added to the statute until 1954. *See* U.S. Congress, Joint Committee on Internal Revenue Taxation, *Summary of the New Provisions of the Internal Revenue Code of 1954 (H.R. 8300)*, at 70 (1955).

This legislative history of the 1934 legislation does not provide any enlightenment as to why the lobbying restriction was applied to charities but not to veterans' groups. *Amicus* VFW surely stretches the point when it describes what took place as "legislative deliberation," VFW Brief at 4, and the government's summary of the legislative history amounts to little more than the assertion that Congress must have had a sufficient reason for treating charities and veterans' groups differently, for otherwise it would not have done so. Govt. Brief at 32, 36-37 & n.18. Because the statutory classification at issue here, which regulates First Amendment freedoms, stands almost entirely without an expression of the purposes Congress may have sought to promote, this Court should be reluctant indeed to accept the conclusion, urged upon it by the government and the *amici* veterans' groups, that the lobbying restriction serves an important purpose.[16]

[16]The government suggests that the purposes underlying the imposition of the lobbying restriction on charities but not on veterans' groups may be divined from subsequent legislation and from the fact that the section 501(c)(3) lobbying restriction has not been eliminated in the years since it was passed in 1934. *See* Govt. Brief at 37-40. However, none of the episodes referred to sheds any light on why veterans' groups are granted a preferred status with respect to lobbying.

B. *Cammarano v. United States* Does Not Support The Discrimination Against Lobbying By Charities.

In attempting to justify the restriction imposed on charities, and the failure to impose a similar restriction on veterans' groups, the government relies heavily on *Cammarano v. United States*, 358 U.S. 498 (1959), contending that the lobbying restriction expresses the same policy as the regulations upheld in *Cammarano*. Govt. Brief at 10. In that case, this Court upheld the IRS' denial to business taxpayers of deductions for certain lobbying expenses, observing that the petitioners were "simply being required to pay for those activities entirely out of their own pockets, as everyone else engaging in similar activities is required to do under the provisions of the Internal Revenue Code." 358 U.S. at 513.

The government finds in *Cammarano* a policy of "neutrality" toward lobbying, which it says relates back to the 1934 legislation. Govt. Brief at 6, 27. Since *Cammarano* involved only business lobbying, there was no occasion for the parties or the Court to discuss the discrimination between charities and veterans' groups which is the subject of this litigation. Moreover, no "neutrality" has existed between charities and veterans' groups since 1934, when the difference in treatment at issue here originated.[17]

Even if there had been a governmental policy of neutrality toward lobbying in 1934, or in 1959, there certainly was no such policy after *Cammarano* was "legislatively reversed" by the enactment of Internal Revenue Code section 162(e) in 1962. Note, *Regulating the Political Activity of Foundations, supra*, 83 Harv. L. Rev. at 1863

[17]Although this Court referred in *Cammarano* to the statutory restriction on lobbying by charities, it failed to note that veterans' groups did not labor under a similar restriction. 358 U.S. at 512.

n.95. *See* Govt. Brief at 19 n.8. Section 162(e) allows most lobbying expenditures by business taxpayers, whether directed at Congress or at the legislative body of a city or state, to be deducted for federal income tax purposes as an "ordinary and necessary" expense of carrying on a trade or business.[18] Thus, the fundamental premise on which *Cammarano* was based – that tax benefits were not to aid either side of a legislative controversy – has been removed. The American Bar Association has summarized the effect of the 1962 amendment:

> . . . [N]ow that direct business lobbying has become a deductible activity under § 162(e), the former "neutral posture of the tax law with respect to lobbying" (see Cammarano v. United States, *supra*) has been upset in favor of the business interests as opposed to the charitable organizations.

ABA Statement *reprinted in Influencing Legislation by Public Charities,* Hearing Before the House Committee on Ways and Means, 94th Cong., 2d Sess. 68 (1976).

More important, Congress certainly does not have any policy of being "neutral" toward lobbying, as the Senate Report on section 162(e) makes clear:

> It is also desirable that taxpayers who have information bearing on the impact of present laws, or proposed legislation, on their trades or businesses not be discouraged in making this information available to Members of Congress or legislators at other levels of Government. The presentation of such information to the legis-

[18]Section 162(e) disallows deductions for expenditures in connection with attempts to influence the general public with respect to legislation – "grass roots" lobbying.

> lators is necessary to a proper evaluation on their part of the impact of present or proposed legislation.

S. Rep. No. 1843, 87th Cong., 2d Sess. 23 (1962); *see* H.R. Rep. No. 1447, 87th Cong., 2d Sess. 17 (1962). Federal policy in this area is one of encouraging participation in the legislative process, not discouraging it. *See generally Eastern Railroad Presidents Conference v. Noerr Motor Freight Inc., supra,* 365 U.S. at 137-38. The clear message which emerges from the Constitution and from the enactment of section 162(e) is that the free flow of information concerning the needs and preferences of citizens is essential to our system of government, and that this policy is as applicable to charities as to other categories of speakers. *See, e.g.,* Clark, *The Limitation on Political Activities: A Discordant Note in the Law of Charities,* 46 Va. L. Rev. 439, 455-60 (1960); Caplin & Timbie, *Legislative Activities of Public Charities,* 39 Law & Contemp. Prob. 183, 198-99 (1975). Therefore, whatever effect *Cammarano* may have had on the constitutionality of section 501(c)(3) has been eliminated by the passage of section 162(e).[19]

C. None Of The Explanations Offered Justifies Prohibiting Substantial Lobbying By Charities While Permitting Veterans' Groups To Lobby Without Limitation.

1. The Justifications For The Lobbying Restriction On Charities Are Insubstantial.

By its very terms, the holding of *Cammarano* is limited to the proposition that *nondiscriminatory* denial of tax

[19]A statute must be evaluated in relation to the purposes alleged to support it at the time it is challenged, not the purposes which way have existed in the past but which are no longer valid. *Illinois State Board of Elections v. Socialist Workers Party,* 440 U.S. 173, 186-87 (1979); *id.* at 190-91 (Rehnquist, J., concurring in the judgment).

deductions is not unconstitutional. 358 U.S. at 513. Since this case involves discriminatory restrictions on lobbying, support for the statutory classification must come from sources other than *Cammarano*. The government refers to several other possible purposes, but none of them can withstand analysis.

First, it is said that the lobbying limitation has the purpose "of preventing abuses of charitable lobbying by private interests." Govt. Brief at 27. Even if it is assumed that preventing such "abuses" is a compelling purpose, the government never even explains what practices it believes are embraced by that term. It is suggested that some charities might really be fronts for private interests, but that possibility remains unproven, speculative, and unquantified. In any event, there is " 'no substantially relevant correlation between the government interest asserted and the State's effort' to prohibit [Taxation] from speaking." *First National Bank of Boston v. Bellotti, supra,* 435 U.S. at 795. First of all, no organization can qualify under section 501(c)(3) unless it shows that it is "organized and operated exclusively" for charitable purposes. The IRS carefully scrutinizes exemption applications, annual exempt organization returns must be filed, and detailed audits are routinely carried out by the IRS. There has been no showing at all that "abuses," if there are any, are more likely to involve lobbying than litigation, publications, speeches, or any of the other types of activities which are used to promote charitable purposes.

Moreover, the lobbying restriction cannot be said to be "closely drawn to avoid unnecessary abridgment" of First Amendment rights, as is required by this Court's holdings in *First National Bank of Boston v. Bellotti, supra,* 435 U.S. at 786, and *Buckley v. Valeo, supra,* 424 U.S. at 25. The sanction imposed on Taxation because it wishes to en-

gage in substantial lobbying is much broader than necessary to promote any governmental interest. Taxation must sacrifice deductibility for donors as to *all* contributions it receives, not just those used for lobbying. Denial of section 501(c)(3) status can, therefore, threaten a charity's ability to operate at all. *See* page 5 *supra*. This presents a striking contrast with *Cammarano*, where denial of a deduction for particular lobbying expenses meant only that the business had to bear all, rather than only a portion, of those particular expenditures. *See Harris v. McRae, supra*, 448 U.S. at 317 n.19; *Maher v. Roe, supra*, 432 U.S. at 474-75 n.8; *Cammarano v. United States, supra*, 358 U.S. at 515 (Douglas, J., concurring).

The asserted interest in preventing illegal diversion of charitable funds to improper purposes is "belied . . . by the provisions of the statute, which are both underinclusive and overinclusive." *First National Bank of Boston v. Bellotti, supra*, 435 U.S. at 793. The restrictions are overinclusive, since all substantial lobbying leads to a denial of section 501(c)(3) status, even if the lobbying is carried on solely to promote charitable purposes.[20] On the other hand, the statutory limitation is underinclusive because it does nothing to curb possible "abuses" by charities which do not involve lobbying, or to curb lobbying abuses by other groups. *See also Zablocki v. Redhail*, 434 U.S. 374, 390 (1978) (restriction on issuance of marriage licenses declared unconstitutional because it was

[20]Any legitimate concern about possible diversion of a charity's resources to private-interest lobbying would be limited to "private foundations" which do not have broad-based support from the public. A "public charity" like Taxation (*see* J.A. 22, 53) would not properly be the subject of such a concern. Congress has passed separate legislation dealing with private foundations, which are virtually prohibited from lobbying by the Tax Reform Act of 1969. *See* Internal Revenue Code §§ 509, 4945.

"grossly underinclusive" and "substantially overinclusive" in relation to purpose alleged to be served).

To the extent that the legislative history bears on the issue at all, it contradicts the government's assertion that the statutory classification was designed to prevent "abuses" by tax-exempt organizations. If that had been the purpose, the lobbying restriction would have been put into effect across-the-board, rather than only for charities. 78 Cong. Rec. 5861, 5959 (1934). Moreover, the conferees' decision to eliminate the proposed restriction on partisan political activities (78 Cong. Rec. 7831) would be utterly incomprehensible. Certainly, if Congress had been concerned about the improper diversion of charitable resources to serve private ends, it would not have banned substantial lobbying in furtherance of charitable purposes, while permitting partisan political activity by charities. If there is, as the government alleges, a sharply defined congressional policy "against the use of large private contributions to distort the legislative process," Govt. Brief at 31, and a corresponding policy to keep federal elections free from the power of money, *id.* at 31 n.14, those policies were not well served by the 1934 legislation.

Another purpose mentioned by the government as a possible justification for the statutory classification is that of "preserving a balance between the lobbying activities of charitable organizations and those of other organizations and individuals." Govt. Brief at 27. Once again, this is a purpose for which the legislative history provides no support. It does not appear that any "balance" has ever existed between the lobbying activities of charities and private interests, nor could there be any serious suggestion that charities have the ability to drown out the voices of other speakers. More importantly, even with regard to direct election expenditures, this Court has held that "the

concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment." *Buckley v. Valeo, supra,* 424 U.S. at 48-49; *First National Bank of Boston v. Bellotti, supra,* 435 U.S. at 790-91. It is plain that this argument cannot survive analysis.

The government suggests at several points that the imposition of a lobbying restriction on charities but not on veterans' groups reflects an attempt by Congress to deal with "the phase of the problem which seems most acute to the legislative mind." Govt. Brief at 14, 29, *quoting Buckley v. Valeo, supra,* 424 U.S. at 105. However, the deference which this Court normally accords to legislative decisions on which aspects of a problem are most in need of correction has no place in the analysis of regulation of First Amendment rights. *Erznoznik v. City of Jacksonville,* 422 U.S. 205, 215 (1975). *See also Schad v. Borough of Mount Ephraim, supra,* 452 U.S. at 77 (Blackmun, J., concurring).[21]

The inappropriateness of permitting the "one step at a time" approach in this area can be seen by examining what would happen if it were applied to other First Amendment issues. Thus, if a legislature could use this approach to deal with such "problems" as the littering caused by distribution of handbills, the noise and disruption attributable to residential picketing, or the inconveniences to residents caused by house-to-house canvassing, the government would possess almost unbridled power to

[21] The "one step at a time" argument might have some application to a typical tax statute not involving First Amendment rights, such as where Congress attempts raise revenue by taxing certain commodities or types of transactions while leaving others untaxed. Not only does the statute at issue here directly regulate First Amendment expression, but the government has never claimed that revenue considerations provide any basis for upholding the lobbying restriction.

silence certain speakers while permitting others to go on speaking. However, this Court has made it clear that a legislature cannot pick and choose among speakers in the same way it can adopt partial measures in other areas of public policy. *Erznoznik v. City of Jacksonville, supra,* 422 U.S. at 215 ("even a traffic regulation cannot discriminate on the basis of content unless there are clear reasons for the distinction"). When First Amendment interests are at stake, departures from the uniform pursuit of an asserted governmental purpose under a "one step at a time" rubric raise doubts as to whether that purpose is genuinely important. *Metromedia, Inc. v. San Diego,* 453 U.S. 490, 520 (1981) (plurality opinion); *Schad v. Borough of Mount Ephraim, supra,* 452 U.S. at 73 n.14. *See* J.S. App. 64a n.43; Kalven, *The Concept of the Public Forum: Cox v. Louisiana,* 1965 Sup. Ct. Rev. 1, 29 ("If some groups are exempted from a prohibition on parades and pickets, the rationale for regulation is fatally impeached.").

The government tries to dismiss the preferred treatment given veterans' groups relative to charities as involving only "unequal levels of government subsidy" rather than a governmental restriction on First Amendment rights. Govt. Brief at 13, 21-24, *citing Maher v. Roe, supra,* 432 U.S. at 475-76; *Harris v. McRae, supra,* 448 U.S. at 315-18, 321-22; *Buckley v. Valeo, supra,* 424 U.S. at 93-108. First of all, as discussed above at pages 18-23, when a governmental subsidy is withheld as a result of the exercise of First Amendment rights, the constitutional analysis must be the same as if a penalty had been imposed. For example, the claimant in *Thomas v. Review Board, supra,* was seeking to collect unemployment benefits, not to avoid some direct interference with his exercise of religious freedom, yet the penalty analysis was applied.

Taxation does not dispute that in attempting "to en-

courage actions deemed to be in the public interest," *Maher v. Roe, supra,* 432 U.S. at 476, Congress has considerable latitude. In *Maher v. Roe* and *Harris v. McRae, supra,* this Court held that Congress and the states may legitimately favor childbirth over abortions with respect to funding from public sources. However, the issue in this case does not concern actions by veterans' groups which Congress may properly try to encourage by financial support, but rather governmental favoritism with respect to the freedom of various groups to express opinions on legislation. Thus, as this Court indicated, if the government attempted to withhold health benefits or general welfare benefits from a woman because she sought an abortion, the regulation could not be upheld. *Harris v. McRae, supra,* 448 U.S. at 317 n.19; *Maher v. Roe, supra,* 432 U.S. at 474-75 n.8. Even more clearly, the statutes would have been unconstitutional if they penalized women for expressing their views on public issues, such as by advocating the right of women to have abortions. *Harris v. McRae, supra,* 448 U.S. at 356 (Stevens, J., dissenting). Yet such a restriction on speech is essentially what is challenged in this case. While the legislature is free to set social policy in certain areas, it "is constitutionally disqualified from dictating the subjects about which persons may speak and the persons who may address a public issue." *First National Bank of Boston v. Bellotti, supra,* 435 U.S. at 784-85.

Buckley v. Valeo does not support the government's argument, either. Unlike the restrictions on speech involved in this case, *Buckley* addressed the issue of a *lowering* of existing barriers to participation in elections, by substituting public financing for private contributions. The Court found no denial of equal protection because the public funds were distributed in accordance with even-handed procedures designed to make sure that the public

funds did not "foster frivolous candidacies, create a system of splintered parties, [or] encourage unrestrained factionalism." 424 U.S. at 101. The discrimination challenged here is not based on such neutral and compelling concerns, but rather on the identities of the classes of speakers.

The *Buckley* Court also ruled that Congress could constitutionally provide public funds for presidential candidates who had to run in primaries, while denying funds to minor party candidates who were engaged in petition drives to qualify for state ballots. 424 U.S. at 105-08. However, this aspect of *Buckley* did not involve restrictions or penalties on the exercise of First Amendment rights by any candidate. The constitutional challenge was based on the fact that the financing was limited to primary elections, which was of no benefit to minor-party candidates who did not need to run in primaries. The Court upheld the statute because all candidates similarly situated (*i.e.*, those facing the expenses of primary elections) had an opportunity to qualify for funds. Not only had there been no showing that the abuses of campaign contributions at which the statute was aimed had occurred in petition drives, but public financing of petition drives would have implicated the same policies which justified the differing levels of public financial support in the general election. 424 U.S. at 106.

The aspects of the election financing program upheld in *Buckley* were considered by Congress to be essential to the attainment of the objectives of the program of which they were a part. Obviously, Congress could properly conclude that the success of the public financing system would be frustrated if it led to the multiplication of political parties. Likewise, this Court found that it was within Congress' authority to provide public financing to candidates facing

primary races, while not extending the program to cover petition drives. Congress could even require candidates to surrender certain freedoms when that was necessary to bring about the statutory objectives. *See Buckley v. Valeo, supra,* 424 U.S. at 57 n.65 (candidate's receipt of federal financing may be conditioned on agreement to abide by limitations on overall expenditures); Note, *Unconstitutional Conditions,* 73 Harv. L. Rev. 1595, 1600 (1960). However, when the legislature does grant a benefit, it cannot do so in a manner which discriminates against the exercise of First Amendment rights. As Justice Frankfurter observed, "Congress may withhold all sorts of facilities for a better life but if it affords them it cannot make them available in an obviously arbitrary way or exact surrender of freedoms unrelated to the purpose of the facilities." *American Communications Ass'n v. Douds,* 339 U.S. 382, 417 (1950) (Frankfurter, J., concurring and dissenting).

Like the statute invalidated in *First National Bank of Boston v. Bellotti,* and several of the restrictions struck down in *Buckley v. Valeo,* the lobbying restriction at issue here represents legislative overkill which seriously impairs First Amendment rights without being closely tied to identified and important governmental purposes. The restriction has been accurately described by *amici* DAV/PVA as a "broad prophylactic," Brief at 20, but as such it cannot survive the searching scrutiny applied by this Court in cases involving the exercise of First Amendment rights.

2. There Are No Differences Between Charities And Veterans' Groups Which Justify Disparate Treatment With Respect To Lobbying.

The government and the *amici* veterans' groups have attempted to justify the statutory classification by pointing to a number of claimed differences between veterans' groups

and charities. However, to the extent that such differences may exist, they are of no constitutional significance.

The government suggests that the statutory classification is designed to guard "against the use of large private contributions to distort the legislative process" and to "keep federal elections 'free from the power of money.' " Govt. Brief at 31 & n.14. Not only are the asserted government interests in preserving the legislative and political processes from abuses entirely unsupported by the legislative history of this lobbying restriction, *see* pages 31-34 *supra*, but there has been no showing at all that veterans' groups are less prone to commit such "abuses" — whatever they may be — than are charities. In fact, partisan political activities by charities are specifically prohibited by a provision of section 501(c)(3) that is not challenged here, and so they are under at least as stringent a restriction in that regard as are veterans' groups. *See* Govt. Brief at 42 & n.21.[22] While it is true that veterans' groups may lobby only in furtherance of their exempt purposes (Govt. Brief at 43-44), a similar restriction is applicable to every charity, including Taxation, since qualification under section 501(c)(3) depends on an organization's proof that it is "organized and operated exclusively" for exempt purposes.[23] Similarly, the requirements that certain veterans' groups must be audited annually and must file reports on their activities (Govt. Brief at 42-43 n.22) do not go significantly beyond the annual returns which all exempt organizations must file with the IRS. The IRS certainly has at its disposal auditing and investigative authority

[22]Unlike charities, veterans' groups are permitted to sponsor political action committees. *See, e.g.*, VFW Brief at 1 n.1.

[23]In the case of veterans' groups, lobbying on issues such as the Panama Canal treaties is apparently considered to be within their exempt purposes. *See* VFW Brief at 25 n.38.

which is sufficient to assure that charities, like veterans' groups, are in compliance with the law.[24]

The government would have this Court treat the preferred status granted lobbying by veterans' groups as just another type of veterans' preference to discharge "a special debt" to those who have served our country. Govt. Brief at 14, 29-30, 45-49. Taxation does not dispute that veterans may properly be granted many types of benefits, such as pensions, medical care, educational subsidies, reemployment rights, and even other tax benefits. Thus, in *Johnson v. Robison*, 415 U.S. 361 (1974), this Court upheld the statute which granted educational benefits to veterans but not to conscientious objectors, because the classification made service in the armed forces more attractive and helped to compensate for the unique disruption of one's career and personal life caused by being in the military. However, as the court of appeals observed, "First Amendment rights may not be used as a type of 'currency' to reward those who have rendered service to the nation or who are otherwise determined to be worthy." (J.S. App. 67a). If Congress wishes to utilize the services of veterans' groups to provide assistance to veterans, it may certainly do so. But the fact that veterans are entitled to preferred

[24]Several of the *amici* appear to suggest that the preferred treatment accorded veterans' groups with respect to lobbying is due to direct congressional oversight of such lobbying to assure that it is proper. *See* DAV/PVA Brief at 17; Am. Legion Brief at 16. However, the disclosure of lobbying activities is already required by the Federal Regulation of Lobbying Act, 2 U.S.C. § 261 *et seq.*, which withstood a constitutional challenge in *United States v. Harriss*, 347 U.S. 612 (1954). If further regulation of lobbying is deemed desirable, Congress must adopt the least restrictive measures which would accomplish its purposes. Substantial lobbying by charities could not be prohibited, as it is under section 501(c)(3), when the regulatory objective could be accomplished by additional disclosure requirements or other steps short of prohibition. Indeed, *Harriss* demonstrates that even disclosure requirements can raise serious constitutional issues.

treatment in some respects, and that veterans' groups may play a role in helping to deliver some of those benefits, cannot elevate the groups to a preferred position with respect to the exercise of First Amendment rights.[25]

Much of the extensive argument provided by the *amici* veterans' groups seems to be directed to proving that veterans' groups are engaged in many socially useful activities, including their charitable work and their participation in the administration of certain veterans' benefit programs. *See* Am. Legion Brief at 16-17. These activities, while laudable, are entirely beside the point. Every group exempt under section 501(c)(3) must also devote itself exclusively to socially beneficial activities approved of by Congress, be they educational, scientific, or charitable.

To the extent that Congress wishes to put into effect additional programs to benefit veterans directly, it surely is free to do so. Thus, for example, Congress could presumably make provision for the reimbursement of the expenses which veterans' groups incur in representing vet-

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[25] *Amici* Disabled American Veterans and Paralyzed Veterans of America argue that great deference should be given to the congressional judgments reflected in section 501's treatment of lobbying because Congress must be allowed to control its own collection of information. DAV/PVA Brief at 6-10. This argument fails to take into account the fact that the lobbying restriction complained of by Taxation applies to lobbying at all levels of government — local, state, and national. Moreover, veterans would certainly not stop providing Congress information concerning the programs which benefit them, even if Congress withdrew the preferred treatment they now enjoy with respect to lobbying. In any event, Congress cannot avoid constitutional requirements, even if it is passing legislation which deals with lobbying, just as the voters cannot use the initiative process to circumvent the Constitution. *See Citizens Against Rent Control v. City of Berkeley, supra,* 454 U.S. at 295. *See also Powell v. McCormack,* 395 U.S. 486 (1969); *Henrico Professional Firefighters Ass'n v. Board of Supervisors,* 649 F.2d 237, 242-43 (4th Cir. 1981) (county board of supervisors may not refuse to listen to certain presentations because of the identities of the speakers).

erans who are pursuing claims under the various benefit programs. *See* DAV/PVA Brief at 26-27. This would be similar to the direct subsidy already provided to veterans' groups in the form of office space. 38 U.S.C. § 3402. Moreover, to the extent that Congress desired a report prepared on a particular topic, such as the needs of veterans, it could commission a qualified organization to prepare such a report, or to reproduce additional copies of a document which had already been prepared (*see* 44 U.S.C. § 1332). What Congress cannot do is what it has done in the present statutes – to favor one class of speakers (veterans' groups) over another (charities) with respect to speech concerning the important public issues raised by legislation.

The government and the *amici* engage in wide-ranging speculation in an effort to identify some meaningful distinction between veterans' groups and charities which might justify the statutory discrimination with respect to lobbying. Differences between the groups are not difficult to find, but listing them in no way establishes that they have any bearing at all on the constitutional issue before the Court. For example, it makes no difference that the "object of veterans' groups' legislative activity, derived from the consensus of their memberships, would predictably be the advancement of veterans' programs." DAV/PVA Brief at 18. While it is true that charities lobby on a broad range of issues, and that different charities may even find themselves on different sides of the same issue, the difference between groups which share a particular outlook and those which reflect a range of opinions cannot possibly constitute a constitutionally sufficient reason for allowing the former category to lobby but not the latter. No matter what the alignment of groups or the positions taken, the availability to Congress of better informa-

tion on how legislation will affect interested parties can be expected to enhance the legislative process. That was the broad public policy which led to the adoption of section 162(e) with respect to business lobbying, and it is equally applicable to lobbying by veterans' groups and charities alike.

D. The Restriction On Lobbying By Charities Should Be Eliminated.

Because the essence of an equal protection claim is a disparity of treatment between classes of similarly situated persons, a constitutional violation can at least theoretically be remedied either by improving the treatment accorded the disfavored class, or by eliminating the advantage enjoyed by the class which has benefited by the classification. However, Taxation is not aware of any case in which an advantage has been withdrawn rather than being extended to cover the party raising an equal protection challenge. Moreover, under the circumstances presented here, extension of the right to lobby to charities is plainly the appropriate remedy.[26]

"In choosing between [the] alternatives, a court should

[26]Because 26 U.S.C. § 7428 only permits an organization to obtain a declaratory judgment as to its own tax status, it is highly doubtful that a district court even has the authority in a section 7428 action to make a declaration as to the tax status of organizations other than the plaintiff. *See* Govt. Brief at 11 ("it is highly questionable whether a court can expand the scope of a lawsuit directed toward achieving specific relief and embark upon a remedial course neither requested nor desired by appellee, that would impose restrictions upon approximately 35,000 veterans' organizations which are not parties to the litigation."). Even if a request for such relief can properly be made, no party sought such relief in this case. Nor is it apparent who, if anyone, would have standing to use section 7428 to seek revocation of tax benefits enjoyed by other organizations which have already qualified under section 501(c).

attempt to accommodate as fully as possible the policies and judgments expressed in the statutory scheme as a whole." *Califano v. Westcott,* 443 U.S. 76, 94 (1979) (Powell, J., concurring in part and dissenting in part). *See generally* Ginsburg, *Some Thoughts on Judicial Authority to Repair Unconstitutional Legislation,* 28 Cleveland St. L. Rev. 301 (1979). Many cases in which this issue has come up have involved equal protection challenges to underinclusive federal benefit statutes, and this Court "has suggested that extension, rather than nullification, is the proper course." *Califano v. Westcott, supra,* 443 U.S. at 89. Thus, this Court has ordered benefit statutes to be extended in order to eliminate an equal protection violation even when the result has been a substantial expenditure of public funds. But in this case the government has never contended that elimination of the lobbying restriction which is being challenged would have any significant adverse impact on the Treasury. In fact, the government has never argued that the extension of the restriction to veterans' groups, rather than its elimination, is the proper remedy.

Moreover, the choice of remedy in this case should take into account the important First Amendment interests involved here which are not typically present in social security or other benefit cases. In past equal protection cases involving First Amendment rights, this Court has invalidated discriminatory restrictions on speech without even discussing the theoretical possibility of extending the restriction. *See, e.g., Carey v. Brown, supra; Police Department v. Mosley, supra.* Likewise, in *Community-Service Broadcasting of Mid-America, Inc. v. FCC,* 593 F.2d 1102 (D.C. Cir. 1978) where the court, sitting *en banc,* found that a requirement that non-commercial broadcasters retain tapes of certain programs violated

equal protection principles because no similar restriction was imposed on commercial broadcasters, it struck down the requirement rather than extending it to cover the commercial broadcasters. *See also Greenberg v. Bolger,* 497 F. Supp. 756, 784-86 (E.D.N.Y. 1980) (advantageous postal rate extended to excluded parties rather than being eliminated for all parties).

Therefore, any resolution of this controversy which extended the restriction on lobbying to cover veterans' groups should be disfavored because it would inevitably dampen the exercise of rights which lie at the core of the First Amendment. In the absence of an explicit legislative command, this Court should not permit invalidation of a statute to become an occasion for further restricting free speech rights. If some new restriction on lobbying is to be developed to replace the statute declared unconstitutional by the court of appeals, that task should be undertaken by Congress, not the courts.

* * *

"When government regulation discriminates among speech-related activities in a public forum, the Equal Protection Clause mandates that the legislation be finely tailored to serve substantial state interests, and the justifications offered for any distinctions it draws must be carefully scrutinized." *Carey v. Brown, supra,* 447 U.S. at 461-62. Under this standard, the statutory classification at issue here must fall. Lobbying by charities in furtherance of their exempt purposes has not been shown to pose any threat to compelling governmental interests, nor has it been shown that the disparate treatment of lobbying by charities and by veterans' groups is justified by any finely tailored and constitutionally legitimate distinction.

CONCLUSION

The judgment of the court of appeals should be affirmed to the extent that it declares the restriction on lobbying by charities to be unconstitutional, and Taxation should be held to be entitled to a tax exemption under section 501(c)(3).

Respectfully submitted,

John Cary Sims
(Counsel of Record)

Alan B. Morrison
Public Citizen Litigation Group
Suite 700
2000 P Street, N.W.
Washington, D.C. 20036
(202) 785-3704

Thomas F. Field
6830 North Fairfax Drive
Arlington, Virginia 22213
(703) 532-1850

Attorneys for Appellee
Taxation with Representation
of Washington

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No. 81-2338

In the Supreme Court of the United States

OCTOBER TERM, 1982

DONALD T. REGAN,
SECRETARY OF THE TREASURY, ET AL., APPELLANTS

v.

TAXATION WITH REPRESENTATION OF WASHINGTON

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF FOR THE APPELLANTS

REX E. LEE
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

TABLE OF AUTHORITIES

Page

Cases:

Beneficial Finance of Kansas, Inc. v. *United States,* appeal dismissed as moot, No. 81-583 (Dec. 13, 1982) 3

Better Business Bureau v. *United States,* 326 U.S. 279 4

Buckley v. *Valeo,* 424 U.S. 1 ..... 7, 9

Cammarano v. *United States,* 358 U.S. 498 ..... 1, 4

Citizens Against Rent Control v. *Berkeley,* 454 U.S. 290 8

Commissioner v. *Sullivan,* 356 U.S. 27 2

Commissioner v. *Tellier,* 383 U.S. 687 2

Dulles v. *Johnson,* 273 F.2d 362, cert. denied, 364 U.S. 834 5

Ensminger v. *Commissioner,* 610 F.2d 189, cert. denied, 446 U.S. 941 8

FEA v. *Algonquin SNG, Inc.,* 426 U.S. 548 3

Harris v. *McCrae,* 448 U.S. 297 9

Haswell v. *United States,* 500 F.2d 1133, cert. denied, 419 U.S. 1107 2

Linmark Associates, Inc. v. *Willingboro,* 431 U.S. 85 8

Maher v. *Roe,* 432 U.S. 464 ..... 8, 9

Page

Cases—Continued:

Mapes v. *United States*, 576 F.2d 896, cert. denied, 439 U.S. 1046 8

Mills v. *Electric Auto-Lite Co.*, 396 U.S. 375 3

Perry Educ. Ass'n v. *Perry Local Educators Ass'n*, No. 81-896 (Feb. 23, 1983) 7

Seasongood v. *Commissioner*, 227 F.2d 907 5

Sherbert v. *Verner*, 374 U.S. 398 9

Slee v. *Commissioner*, 42 F.2d 184 4

Thomas v. *Review Bd.*, 450 U.S. 707 8

United States v. *Harriss*, 347 U.S. 612 ..... 4, 5

United States v. *Reliable Transfer Co.*, 421 U.S. 397 3

United States v. *Security Industrial Bank*, No. 81-184 (Nov. 30, 1982) 3

Zablock v. *Redhail*, 434 U.S. 734 8

Constitution, statutes and regulations:

U.S. Const. :

Amend. I (Establishment and Free Exercise Clauses) 1, 2, 3, 7, 9

Amend. V 7

Act of Oct. 3, 1913, ch. 16, Section II(G)(a), 38 Stat. 172 4

Internal Revenue Code of 1954 (26 U.S.C. (& Supp. V)):

Section 162(e) 1-2

Page

Constitution, statutes and regulations—Continued:

Section 170(c)(2) 1, 3
Section 501(c)(3) 1, 3, 5, 6
Section 501(c)(4) 6
Section 501(h) 5
Section 4911(d) 2
Section 7428 4

Revenue Act of 1962, Pub. L. No. 87-834, Section 3(a), 76 Stat. 973 1

Tax Reform Act of 1976, Pub. L. No. 94-455, Section 1307, 90 Stat. 1720-1729 2

Treasury Regulations on Income Tax (1954 Code) (26 C.F.R.):

Sec. 1.501(c)(3)-1(c)(3)(iv) 5
Sec. 1.501(c)(4)-1(a)(2)(ii) 5-6

42 U.S.C. (Supp. IV) 2996f(a)(5) 8

47 U.S.C. 399 8

Miscellaneous:

78 Cong. Rec. (1934):

p. 5861 6
p. 5959 6

Rev. Rul. 62-71, 1962-1 Cum. Bull. 85 5

Rev. Rul. 64-195, 1964-2 Cum. Bull. 138 5

Rev. Rul. 70-79, 1970-1 Cum. Bull. 127 5

Rev. Rul. 80-282, 1980-2 Cum. Bull. 178 5

S. Rep. No. 1881, 87th Cong., 2d Sess. (1962) 2

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1. In our opening brief (at 19-20), we emphasized that the lobbying limitations prescribed for certain tax-exempt organizations by Sections 501(c)(3) and 170(c)(2) of the Internal Revenue Code of 1954 (26 U.S.C.) expressed the same policy against federal subvention of lobbying activity as the Treasury Regulations which this Court upheld against a First Amendment challenge in *Cammarano* v. *United States*, 358 U.S. 498 (1959). There, the Court approved the denial of a business deduction by a taxpayer for sums expended in an effort to defeat an initiative measure that would have seriously affected, if not wholly destroyed, his trade or business. See 358 U.S. at 500.

Contrary to appellee's argument (Br. 37), the subsequent enactment of Section 162(e) of the 1954 Code, by Section 3(a), Revenue Act of 1962, Pub. L. No. 87-834, 76 Stat. 973, does not undermine the authority of *Cammarano*. Section

162(e) now permits a business to deduct as an ordinary and necessary business expense under Section 162 an amount incurred "in direct connection with" a presentation to a legislature with respect to legislation "of direct interest to the taxpayer * * *."[1] As the court below observed, "[t]here is a significant difference between profitmaking and non-profitmaking entities, and it seems probable that each type lobbies with different motives" (J.S. App. 47a-48a). Accord, *Haswell* v. *United States*, 500 F.2d 1133, 1150 (Ct. Cl. 1974), cert. denied, 419 U.S. 1107 (1975). Moreover, as *Cammarano* itself demonstrates, the enactment of Section 162(e) was not prompted by any constitutional principle requiring the deductibility of such expenditures but by policy considerations within Congress' power to determine. Section 162(e) therefore does not support appellee's argument that the Constitution guarantees charitable contribution deductions for payments to organizations that engage in substantial lobbying activities. Indeed, in rejecting appellee's claim that the First Amendment guarantees it the unlimited right to lobby without forfeiting its tax-exempt status and its eligibility to receive tax-deductible contributions, even the court below recognized the continuing

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[1]The relevant legislative history of Section 162(e) (S. Rep. No. 1881, 87th Cong., 2d Sess. 22-23 (1962)), indicates that Congress considered the deduction of lobbying expenditures by a business to be desirable as a matter of policy to encourage the presentation to legislators of information regarding the effect of legislation upon a taxpayer's trade or business. In addition, Congress concluded that the deduction of such expenditures as a business expense was necessary to arrive at a true reflection of the income of a business for tax purposes. *Ibid.* See *Commissioner* v. *Tellier*, 383 U.S. 687, 691-693 (1966); *Commissioner* v. *Sullivan*, 356 U.S. 27, 29 (1958). Cf. 26 U.S.C. (& Supp. V) 4911(d), added to the 1954 Code by Section 1307, Tax Reform Act of 1976, Pub. L. No. 94-455, 90 Stat. 1720-1729, which specifies that an activity by a public charity is not "influencing legislation" if it consists of appearances before or communications to a legislature concerning a matter that might affect the powers, duties, or tax status of the organization.

authority and relevance of *Cammarano* (J.S. App. 30a-35a).[2]

Contrary to appellee's further argument (Br. 38-39, 42-43), *Cammarano* cannot be distinguished on the ground that there the Court sustained the denial of deductions only for funds used for lobbying, while here the limitations of Sections 501(c)(3) and 170(c)(2) disqualify appellee from tax-exempt status and from receiving any tax-deductible

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[2]Appellee has docketed a cross-appeal (No. 82-134) seeking review of the court of appeals' holding that the lobbying provisions of Sections 501(c)(3) and 170(c)(2) do not violate its right to freedom of speech and to petition Congress under the First Amendment. In response, we filed a motion to dismiss that cross-appeal in which we argue that appellee may not seek review of an adverse holding of the court of appeals except by certiorari, and that treating the cross-appeal as a petition for certiorari, it must be denied as out of time. We advanced the same argument with respect to jurisdiction and timeliness as to certiorari in a motion to dismiss in *Beneficial Finance of Kansas, Inc.* v. *United States*, No. 81-583, dismissed as moot Dec. 13, 1982, a cross-appeal filed in connection with the government's appeal in *United States* v. *Security Industrial Bank*, No. 81-184 (Nov. 30, 1982). In our motion to dismiss, we further argue that even assuming that the Court has jurisdiction to grant certiorari, the petition should be denied because the First Amendment claim is answered fully by this Court's decision in *Cammarano*.

Contrary to appellee's argument (Br. 9, n.10) on this appeal (No. 81-2338), the fact that this case comes here on the Secretary's appeal does not permit appellee to seek review of the court of appeals' holding that the Code's lobbying provisions do not violate its First Amendment rights. As appellee views its First Amendment claim (see 82-134 J.S. 6), its acceptance by this Court would require a modification of the judgment below to ensure that it qualifies for Section 501(c)(3) status. The judgment entered, which directs a remand of the case to the district court for further proceeedings, unquestionably leaves appellee's qualification under Section 501(c)(3) in doubt. Accordingly, such a modification of a judgment may be obtained, if at all, only by a cross-appeal or by a timely cross-petition for certiorari, neither of which appellee has perfected. *FEA* v. *Algonquin SNG, Inc.*, 426 U.S. 548, 560 n.11 (1976); *United States* v. *Reliable Transfer Co.*, 421 U.S. 397, 401 n.2 (1975); *Mills* v. *Electric Auto-Lite Co.*, 396 U.S. 375, 381 n.4 (1970).

contributions. As we explained in our opening brief (p. 23 n.10), appellee's disqualification is not a penalty upon its lobbying activity but follows from the longstanding requirement of the charitable exemption provisions (see Act of Oct. 3, 1913, ch. 16, Section II(G)(a), 38 Stat. 172) that accord charitable status only to those organizations organized and operated "exclusively" for a qualifying purpose. Thus, if a single activity or purpose of an organization falls outside these statutes, as does lobbying (see *Cammarano* v. *United States, supra,* 358 U.S. at 512; *Slee* v. *Commissioner,* 42 F.2d 184, 185 (2d Cir. 1930)), and is substantial in nature, it suffices to destroy the charitable exemption whether or not the organization has another activity or purpose. *Better Business Bureau* v. *United States,* 326 U.S. 279, 283 (1945). Appellee does not dispute (Br. 3 n.4) that a substantial, if not the primary, activity by which it intends to reach its goals is to lobby Congress with regard to tax legislation.[3] Its disqualification is therefore no broader than required to carry out the underlying congressional objective. Cf. *United States* v. *Harriss,* 347 U.S. 612, 622-623 (1954).[4]

2. This is not to suggest, as appellee does (Br. 5-6, 16-18), that Congress has failed to recognize that lobbying may

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[3]The court below correctly pointed to the administrative difficulty in this circumstance of tracing and disallowing charitable deductions to donors only in that proportion in which their contributions actually are used by the donee organization for lobbying (J.S. App. 74a n.52).

[4]The amicus Veterans of Foreign Wars (Br. 4-14) argues that the district court lacked jurisdiction under Section 7428 (26 U.S.C. (& Supp. V)) because that statute does not encompass constitutional challenges. We disagree. For substantially the reasons set forth by the appellee (Br. 10 n.11), we do not believe that in affording judicial review under Section 7428 of denials of tax-exempt status, Congress intended to foreclose consideration of constitutional claims such as that presented here.

further a charitable end.[5] On the contrary, the Senate Finance Committee sought unsuccessfully to structure the

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[5]The American Association of Museums, et al., as amici, point out (Br. 5-6) that many charitable organizations, including the National Audubon Society and the Girl Scouts, have supported the enactment of legislation. To the extent this is done in a non-partisan or objective fashion to facilitate an evaluation of such legislation, it will not cause forfeiture of charitable tax status. Treasury Regulations on Income Tax (1954 Code), 26 C.F.R. 1.501(c)(3)-1(c)(3)(iv). For example, in Rev. Rul. 64-195, 1964-2 Cum. Bull. 138, the Service ruled that the exempt status of a nonprofit educational organization under Section 501(c)(3) was not affected by its nonpartisan study, research and assembly of materials in connection with court reform and the dissemination of such materials to the public. The ruling emphasized that the organization did not participate in the presentation of any bill or urge the enactment of any particular proposal. Accord: Rev. Rul. 70-79, 1970-1 Cum. Bull. 127; Rev. Rul. 78-248, 1978-1 Cum. Bull. 154, amplified by Rev. Rul. 80-282, 1980-2 Cum. Bull. 178. On the other hand, an organization cannot maintain Section 501(c)(3) status if, as its principal objective, it advocates the adoption of a doctrine or theory which can become effective only by the enactment of legislation. Rev. Rul. 62-71, 1962-1 Cum. Bull. 85 (nonprofit organization formed for the purpose of supporting an educational program for the stimulation of interest in the study of economics, to promote the single tax theory of taxation, held not exempt under Section 501(c)(3)). See also *Dulles* v. *Johnson*, 273 F.2d 362, 367-368 (2d Cir. 1959), cert. denied, 364 U.S. 834 (1960).

Indeed, the terms of the statutes permit a charitable organization to retain its status even if it crosses the line to engage in legislative advocacy that does not amount to a substantial part of its overall activity. See *United States* v. *Harriss*, 347 U.S. 612, 622 n.13 (1954), collecting cases; *Seasongood* v. *Commissioner*, 227 F.2d 907, 910-912 (6th Cir. 1955). And Section 501(c)(3) organizations can also elect to quantify their lobbying activities under Section 501(h) with assurance that they will not endanger their tax-exempt status and eligibility to receive tax-deductible contributions. It does not appear that the amici organizations are comparable to appellee, which was organized for the primary purpose of influencing the tax law through lobbying (J.A. 37).

The same amici also seek (Br. 15-20) to discount the significance of the fact that an organization operated exclusively for social welfare purposes may qualify for tax exemption under Section 501(c)(4) even though it engages in a substantial amount of lobbying. Treasury Regulations on Income Tax (1954 Code), Section 1.501(c)(4)-1(a)(2)(ii) (26

lobbying restriction to reach only the selfish contribution made to advance the personal interest of the donor. 78 Cong. Rec. 5861 (1934) (remarks of Sen. Reed). Congress recognized, however, that mistakes in administration of the provision, as well as decisions giving the appearance of favoritism, could not be avoided unless the charitable contribution deduction were denied for contributions to all charitable organizations engaged in substantial lobbying. As Senator La Follette observed (*id.* at 5959), "[i]t is difficult from the administrative point of view for those in the Internal Revenue Bureau to determine when an organization is carrying on a type of activity which ought to be encouraged, and when it is carrying on a propaganda type of activity." Thus, contrary to appellee's argument (Br. 38-40), the lobbying limitation was framed to redress abuses by charitable organizations without requiring a protracted inquiry into the tactics and aims of the different types of lobbying in which they engage.

3. Nor does the equal protection guaranty require Congress to impose the same requirements with respect to the legislative activity of veterans' organizations as are applied to charitable organizations. Congress has had a longstanding interest in veterans' affairs and its standing committees devoted to this subject attest to its continuous desire to educate itself with respect to the concerns of veterans. See

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C.F.R.). Like many other affiliated organizations, appellee's predecessor organizations operated for years in tandem, one under Section 501(c)(3), the other under Section 501(c)(4), to further their ends without running afoul of the lobbying provisions. This mode of operation was abandoned, and appellee formed, merely because the dual arrangement was thought to be inefficient (J.A. 20-23). (Contributions from the public to appellee's Section 501(c)(4) predecessor were 23 % less than contributions to its Section 501(c)(3) predecessor (J.A. 20)). At all events, whether or not appellee may structure itself along dual lines (see J.S. App. 34a-35a), the constitutional provisions appellee invokes do not require that it be allowed to lobby with tax-deductible contributions.

Amici Curiae Brief of Disabled American Veterans and Paralyzed Veterans of America at 7-10, 19-29. Moreover, as we pointed out in our opening brief (at 17-18), the decisions of this Court accord wide latitude to the legislatures to draw distinctions in framing revenue statutes. The distinction drawn for this purpose between the activities of the separate categories of exempt organizations does not invite the same level of judicial scrutiny as if Congress had imposed a limitation directly on such activity. There is no indication that Congress intended to advance one viewpoint or to suppress another. The law applies even-handedly to all organizations in the designated categories regardless of the particular positions any such organization may choose to espouse. The legislative classification merely reflects the special status in our society that veterans' organizations occupy and that charitable organizations do not share (see our opening brief at 42-49). Thus, Congress' refusal to place appellee on the same tax footing as veterans' groups does not discriminate against any particular idea or point of view in a manner barred by the First or the Fifth Amendment. See *Perry Educ. Ass'n.* v. *Perry Local Educators Ass'n,* No. 81-896 (Feb. 23, 1983), slip op. 11-13. Indeed, even in the context of governmental financial assistance, this Court noted in *Buckley* v. *Valeo,* 424 U.S. 1, 93 n.127 (1976), in rejecting a comparable claim that the guaranties of free speech and equal protection were violated by statutes that funded activity by certain candidates for public office but not by others:

> Legislation to enhance these First Amendment values is the rule, not the exception. Our statute books are replete with laws providing financial assistance to the exercise of free speech, such as aid to public broadcasting and other forms of educational media, 47 U.S.C. §§ 390-399, and preferential postal rates and antitrust exemptions for newspapers, 39 C.F.R. § 132.2 (1975); 15 U.S.C. §§ 1801-1804.

Citizens Against Rent Control v. *Berkeley*, 454 U.S. 290 (1981), *Linmark Associates, Inc.* v. *Willingboro*, 431 U.S. 85 (1977), and similar decisions upon which appellee relies (Br. 21-25), are therefore inapposite. Those cases involved a prohibition placed directly upon a protected activity, and not, as here, a decision to encourage protected activity to the extent consistent with legislative policy. See *Maher* v. *Roe*, 432 U.S. 464, 475-477 (1977).[6] Indeed, appellee's position necessarily comes down to urging that any tax statute that indirectly affects the exercise of a fundamental right is itself subject to strict scrutiny and is unconstitutional. But *Cammarano* itself refutes that proposition. Similarly, while the right to marry has been characterized by this Court as a fundamental right (*Zablocki* v. *Redhail*, 434 U.S. 734 (1978)), the courts have applied a rational basis test and rejected constitutional challenges under the equal protection clause to federal tax statutes that impose higher rates upon working married couples. See, *e.g.*, *Mapes* v. *United States*, 576 F.2d 896, 901-903 (Ct. Cl.), cert. denied, 439 U.S. 1046 (1978). See also *Ensminger* v. *Commissioner*, 610 F.2d 189, 192-194 (4th Cir. 1979), cert. denied, 446 U.S. 941 (1980) (rejecting constitutional challenge to denial of dependency deduction for woman who lived with the taxpayer and was supported by him, but was not married to him).

Finally, *Sherbert* v. *Verner*, 374 U.S. 398 (1963), and *Thomas* v. *Review Bd.*, 450 U.S. 707 (1981), upon which appellee relies (Br. 22-23, 42), have no bearing here. In each of those cases, the disqualification of the claimant from the receipt of all benefits was broader than required by the end

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[6]Cf. 42 U.S.C. (Supp. IV) 2996f(a)(5), which precludes a recipient of funds from the Legal Services Corporation from using them to influence the passage or defeat of any legislation; 47 U.S.C. 399, which precludes a noncommercial educational broadcasting station from editorializing and from providing support to a political candidate.

sought by the legislation. See 374 U.S. at 406-407; 450 U.S. at 718-719. The Court therefore regarded the disqualification as a penalty upon the exercise of the right affected. Here, on the other hand, the lobbying limitation provisions simply evidence Congress' refusal to subsidize certain protected activity. Since appellee's principal, if not sole, activity is lobbying, it can hardly complain that its disqualification is broader than the end sought by the legislation. Moreover, *Sherbert* and *Thomas* were decided in the significantly different context of the governmental obligation of neutrality imposed by the Establishment and Free Exercise Clauses of the First Amendment. See *Harris* v. *McCrae*, 448 U.S. 297, 317 n.19 (1980); *Maher* v. *Roe*, *supra*, 432 U.S. at 474 n.8; *Buckley* v. *Valeo*, *supra*, 424 U.S. at 93 n.127.

CONCLUSION

For the reasons stated above and in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

REX E. LEE
Solicitor General

MARCH 1983

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ALEXANDER L. STEVAS,

No. 81-2338

IN THE
Supreme Court of the United States

OCTOBER TERM, 1982

DONALD T. REGAN, SECRETARY OF THE TREASURY, *et al.*,
Appellants,

v.

TAXATION WITH REPRESENTATION OF WASHINGTON, *Appellee*.

On Appeal From The United States Court of Appeals For The District Of Columbia Circuit

AMICUS CURIAE BRIEF OF AMERICAN ASSOCIATION OF MUSEUMS, AMERICAN COUNCIL FOR THE ARTS, AMERICAN HEART ASSOCIATION, THE AMERICAN NATIONAL RED CROSS, CAMP FIRE, INC., GIRL SCOUTS OF THE USA, GIRLS CLUBS OF AMERICA, INC., GOODWILL INDUSTRIES OF AMERICA, LUTHERAN COUNCIL IN THE USA, MARCH OF DIMES BIRTH DEFECTS FOUNDATION, NATIONAL AUDUBON SOCIETY, NATIONAL BOARD OF YMCAs, NATIONAL COMMITTEE FOR RESPONSIVE PHILANTHROPY, NATIONAL CONFERENCE OF CATHOLIC CHARITIES, NATIONAL COUNCIL OF THE CHURCHES OF CHRIST IN THE USA, NATIONAL COUNCIL OF LA RAZA, NATIONAL EASTER SEAL SOCIETY, INC., NATIONAL MENTAL HEALTH ASSOCIATION, NATIONAL WILDLIFE FEDERATION, PLANNED PARENTHOOD FEDERATION OF AMERICA, INC., UNITED WAY OF AMERICA, AND INDEPENDENT SECTOR, IN SUPPORT OF APPELLEE.

JOHN G. MILLIKEN
PAUL E. BOUSQUET
WINSTON & STRAWN
2550 M Street, N.W.
Washington, D.C. 20037
202/828-8400
Of Counsel

*THOMAS A. TROYER
H. DAVID ROSENBLOOM
ALBERT G. LAUBER, JR.
CAPLIN & DRYSDALE, CHARTERED
1101 Seventeenth Street, N.W.
Washington, D.C. 20036
202/862-5000
Attorneys for *Amici Curiae*
*Counsel of Record

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTEREST OF *AMICI CURIAE*	1
SUMMARY OF ARGUMENT	2
ARGUMENT:	
I. Legislative Activities Are A Proper And Important Means Of Furthering Charitable Purposes.	3
II. The Restrictions On Charities' Legislative Activities Impose An Unconstitutional Condition On The Exercise Of First Amendment Rights.	8
III. Tested Under The Strict Scrutiny That Is Appropriate Here, The Restrictions On Charities' Legislative Activities Must Be Invalidated.	21
A. The Lobbying Restrictions Do Not Serve Any Compelling State Interest Nor Are They Closely Drawn To Serve The Interests Invoked In Their Defense.	21
B. Section 501(h) Is Irrelevant To The Constitutionality Of The Challenged Lobbying Restrictions.	25
C. The Proper Remedy Is To Invalidate The Challenged Lobbying Restrictions.	28
CONCLUSION	30

TABLE OF AUTHORITIES

CASES: Page

Bob Jones University v. *Simon*, 416 U.S. 725 (1974) .. 12

Buckley v. *Valeo*, 424 U.S. 1 (1976) 7, 25

Cammarano v. *United States*, 358 U.S. 498 (1959) . *passim*

Center on Corporate Responsibility, Inc. v. *Shultz*, 368 F.Supp. 863 (D.D.C. 1973) 17

Central Hudson Gas & Electric Corp. v. *Public Service Comm'n*, 447 U.S. 557 (1980) 21

Christian Echoes Nat'l Ministry v. *United States*, 470 F.2d 849 (10th Cir.), *cert. denied*, 414 U.S. 864 (1973) 26

Consolidated Edison Co. v. *Public Service Comm'n*, 447 U.S. 530 (1980) 8, 21

Eastern R.R. Presidents Conf. v. *Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961) 8

Elrod v. *Burns*, 427 U.S. 347 (1976) 8

First National Bank v. *Bellotti*, 435 U.S. 765 (1978) . 21

Goldsboro Christian Schools, Inc. v. *United States*, No. 81-1, *argued*, 51 U.S.L.W. 3300 (U.S. Oct. 19, 1982) 4

Harris v. *McRae*, 448 U.S. 297 (1980) 11

Haswell v. *United States*, 500 F.2d 1133 (Ct. Cl. 1974), *cert. denied*, 419 U.S. 1107 (1975) 26

Healy v. *James*, 408 U.S. 169 (1972) 14, 15

McDonald v. *Paty*, 435 U.S. 618 (1978) 8

National Rifle Ass'n v. *U.S. Postal Service*, 407 F.Supp. 88 (D.D.C. 1976) 19

Perry v. *Sindermann*, 408 U.S. 593 (1972) 8

Seasongood v. *Commissioner*, 227 F.2d 907 (6th Cir. 1955) 26

Shelton v. *Tucker*, 364 U.S. 479 (1960) 21

Sherbert v. *Verner*, 374 U.S. 398 (1963) 8

Sierra Club v. *U.S. Postal Service*, 549 F.2d 1199 (9th Cir. 1976) 19

Speiser v. *Randall*, 357 U.S. 513 (1958) 9

Thomas v. *Review Board*, 450 U.S. 707 (1981) 8

Table of Authorities Continued

Page

Village of Schaumburg v. *Citizens For A Better Environment*, 444 U.S. 620 (1980) 18, 22, 24

CONSTITUTION, STATUTES, REGULATIONS, and RELATED AUTHORITY:

U.S. Const. Amend. I ..... *passim*

Internal Revenue Code of 1954, as amended (26 U.S.C.):

Section 162(e) 22, 25

Section 170(c)(2) 2

Section 501(c)(3) ..... *passim*

Section 501(c)(4) 13

Section 501(h) 25-28

Section 501(h)(1) 26

Section 501(h)(5) 26

Section 509(a) 7, 24

Section 4911(a)(1) 26

Section 4911(c)(2) 26

Section 4911(c)(4) 26

Section 4945 ..... 7, 28

Treasury Regulations on Income Tax (26 C.F.R.):

Reg. § 1.162-20(c)(3) 22

Reg. § 1.170A-9(h)(4)(ii) 7

Reg. § 1.501(c)(3)-1(d) 4, 24

Reg. § 1.509(a)-3(a) 24

Reg. § 53.4945-2 28

Rev. Rul. 72-513, 1972-2 C.B. 246 16

Rev. Rul. 77-232, 1977-2 C.B. 71 16

Rev. Rul. 78-85, 1978-1 C.B. 150 4

IRS Exempt Organization Handbook ¶ 392(5)(1982) ... 16

IRS Exempt Organization Handbook ¶ 394(1)(1982) ... 26

Table of Authorities Continued

Page

LEGISLATIVE MATERIALS:

S. Rep. No. 91-552, 91st Cong., 1st Sess. (1969) 7

78 Cong. Rec. 5861 (1934) 23

Influencing Legislation by Public Charities: Hearings on H.R. 13500 Before the House Comm. on Ways and Means, 94th Cong., 2d Sess. (1976) 22

MISCELLANEOUS:

Bogert, Trusts and Trustees § 378 (2d ed. 1977) 3

Memorandum of Law in Support of Defendant's Motion for Summary Judgment, *National Association for the Advancement of Colored People* v. *N.A.A.C.P. Legal Defense and Educational Fund, Inc.*, Civil Action No. 82-1424 (S.D.N.Y. 1982) 17

2 Restatement (Second) of the Law of Trusts § 374 (1959) 4

4 Scott on Trusts § 374.4 (3d ed. 1967) 4

U.S. Postal Service, Domestic Mail Manual § 611.2b (1982) 19

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INTEREST OF AMICI CURIAE

Amici curiae are publicly-supported charitable organizations whose objectives include relief of the poor, care for the sick, promotion of education, protection of children, and advancement of physical, mental, and spiritual health. *Amicus curiae* Independent Sector was formed in 1980 to preserve and enhance this Nation's tradition of giving, volunteering, and not-for-profit initiative; its 450 members and affiliates include many of the major philan-

thropic and voluntary organizations in the country.[1] All *amici* are exempt from federal income tax under section 501(c)(3) of the Internal Revenue Code[2] and are qualified to receive tax-deductible charitable contributions under section 170(c)(2).

This case is of exceptional importance to the Nation's charities, to the people they serve, and to society at large. In their efforts to accomplish charitable purposes, *amici* find it desirable—often necessary—to take positions on legislation at the national, state, and local levels. The lobbying restrictions of the Internal Revenue Code severely limit the permissible scope of such legislative activities, and thus impair *amici's* ability to achieve their philanthropic goals. *Amici* urge this Court to invalidate these restrictions as violative of public charities' First Amendment rights.

Counsel for both parties have consented to the filing of this brief. Letters of consent are on file with the Clerk.

SUMMARY OF ARGUMENT

Provisions of the Internal Revenue Code relating to charitable organizations explicitly condition valuable Government benefits (tax exemption and the ability to receive tax-deductible contributions) upon charities' waiver of First Amendment rights (the right to engage in "substantial" legislative advocacy). These provisions go beyond a mere Government refusal to subsidize lobbying, the situation before this Court in *Cammarano* v. *United*

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[1] Independent Sector acts in this matter through its board of directors; its joining in this Brief does not imply that each of its member organizations has taken a position on the questions presented here.

[2] All statutory references are to the Internal Revenue Code of 1954, as amended (the "Code" or "IRC"), unless otherwise indicated.

States, 358 U.S. 498 (1959). The provisions challenged here affirmatively *penalize* legislative action by charities. Because these provisions are not narrowly drawn to serve a compelling state interest, they are a classic example of an "unconstitutional condition" on free speech.

In response to this argument, the Court of Appeals suggested the use of sophisticated tax planning. A sister organization, in that Court's view, could "easily" be created under other provisions of the Code to lobby on a charity's behalf. It is, however, alien to the First Amendment to force one person, barred from speech, to exercise his rights through another. Moreover, the various practical problems that encumber the suggested "dual organizational structure" constitute independently sufficient grounds for rejecting it as an answer to charities' First Amendment claims.

Analyzed under traditional First Amendment criteria, the challenged lobbying restrictions are constitutionally infirm. They should be declared invalid. Such a declaration would avoid the necessity of reaching the Equal Protection issues on which the Court of Appeals rested its decision, as well as the troublesome remedy envisioned by that Court.

ARGUMENT

I. Legislative Activies Are A Proper And Important Means Of Furthering Charitable Purposes.

It is useful at the outset to focus precisely on what is at issue here. This case involves *legislative* activity by *publicly-supported* charities in furtherance of their *philanthropic* objectives.

The law of charitable trusts explicitly recognizes the importance and propriety of legislative advocacy as a means of achieving philanthropic objectives. *See* Bogert,

Trusts and Trustees § 378, at 188-91 (2d ed. 1977); 2 Restatement (Second) of the Law of Trusts § 374, at 257, 260 (1959); 4 Scott on Trusts § 374.4, at 2912 (3d ed. 1967). Charities employ legislative action as a means to an end. The end may be promotion of racial equality, prevention of cancer, or protection of children. The means may be funding scientific research, publishing sociological studies, or conducting public education programs. These activities are not necessarily "charitable" *per se;* rather, they have a "charitable" character because of the purposes they promote.[3] Legislative action is no different in principle from these other activities. When a charity employs legislative advocacy as a means to further its philanthropic objectives, that advocacy is no less proper—and no less charitable—than any other activity the charity undertakes.

Longstanding Treasury regulations also establish that the general law of charitable trusts governs the meaning of "charitable" for federal tax purposes. The regulations expressly provide that "the term 'charitable' is used in section 501(c)(3) in its generally accepted legal sense." Treas. Reg. § 1.501(c)(3)-1(d)(2). *See, e.g.*, Rev. Rul. 78-85, 1978-1 C.B. 150 (citing law of charitable trusts). There can thus be no doubt that legislative activity in furtherance of a charity's philanthropic ends is not only permissible activity, but is *charitable* activity, for tax and non-tax purposes alike.

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[3] The word "charitable" is used throughout this Brief in its generally accepted tax sense, *i.e.*, as an all-encompassing term that includes various more specific purposes (educational, religious, scientific, and the like) that may qualify an organization for tax exemption under section 501(c)(3). *See* Treas. Reg. § 1.501(c)(3)-1(d)(2). The Court need not here address the questions as to the meaning of the term that are presented in *Goldsboro Christian Schools, Inc.* v. *United States*, No. 81-1, *argued*, 51 U.S.L.W. 3300 (U.S. Oct. 19, 1982).

This is not merely an academic or theoretical point. In practice, the ability of many charitable organizations to fulfill their mission depends upon their freedom to participate in the legislative process. Typical examples of *amici's* legislative activities underscore this fact:

The National Mental Health Association is organized to prevent mental illness and provide better services for the mentally disabled. Many States have laws governing civil commitment and treatment of the mentally disturbed that fail to reflect advances made by contemporary psychiatric research. In an effort to secure better and more humane treatment for the mentally ill, the Association and its local chapters have supported revision of such laws and the enactment of modern community mental health codes.

The National Conference of Catholic Charities is dedicated to promotion of religious values, provision of social services to people and families in crisis, and relief of the economically disadvantaged. In an effort to help poor families secure decent housing, the Conference's local affiliates have supported enactment of state laws prohibiting landlords from refusing to rent apartments to people because they are poor or because they have children.

The American Heart Association seeks to reduce death and disability from cardiovascular disease. Scientific research, financed both by the Association and the Federal Government, demonstrates that smoking, hypertension, and high cholesterol levels are leading causes of heart attack and stroke. In an effort to reduce the risk of heart disease, the Association has supported enactment of legislation that would establish local emergency medical services and help inform people of the dangers of smoking and high fat diets.

The National Audubon Society is dedicated to the protection of wildlife and other natural resources. In an effort to help save endangered species from extinction, the Society has supported enactment of state laws that protect cranes, bald eagles, and other birds.

The Girl Scouts of the USA and its local affiliates provide a variety of services to millions of young people nationwide. In furtherance of its charitable purposes, the Girl Scouts has supported enactment of federal laws that encourage States to provide preventive medical treatment to children from poor families, and to provide community-based services as alternatives to detention of juvenile delinquents.

As these examples show, legislative activity is simply one means (among many permissible means) by which charities strive to accomplish their basic charitable goals. Many philanthropic goals can be achieved only by a change in law. Influencing legislation is often indispensable if charities are to fulfill the purposes for which they were established.[4]

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[4] Although legislative activity is often important to charities, it is also true that lobbying occupies a minor niche in the scheme of overall charitable endeavor. The Government, citing the large number of organizations that are tax exempt under section 501(c)(3), suggests that invalidation of the lobbying restrictions will open a "Pandora's Box of woes and abuse." Brief ("Br.") at 8. The Government's implication that charities, absent restrictions on their legislative advocacy, will abandon their basic functions and become full-time lobbyists is simply wrong. Universities will continue to educate students, the Red Cross will continue to rescue earthquake victims, and hospitals will continue to treat the sick, regardless of how the Internal Revenue Code deals with lobbying. Invalidation of the challenged restrictions will simply free charities to operate without fear of disastrous tax consequences in those circumstances where legislative activity is vital to accomplishment of their charitable goals.

It is likewise useful to stress at the outset what this case does *not* involve. The Internal Revenue Code, besides limiting charities' legislative advocacy, flatly prohibits charities from engaging in political activities on behalf of candidates for public office. IRC § 501(c)(3). The interdiction against political campaign activity is based on an entirely different set of governmental policies, and the constitutionality of those provisions is not in question here. *Cf. Buckley* v. *Valeo*, 424 U.S. 1 (1976). In addition, besides limiting the scope of legislative activity by public charities,[5] the Code imposes separate and more stringent limitations on legislative activity by private foundations. *See* IRC § 4945. These latter provisions are part of a comprehensive statutory pattern, enacted by Congress in 1969, that regulates private foundations' investment holdings, income distribution policies, and transactions with related parties. These provisions reflect a congressional judgment that particularly severe anti-abuse restrictions are required in the case of private foundations because they are funded by a single individual or a small group and thus lack the discipline of public support. *See* S. Rep. No. 91-552, 91st Cong., 1st Sess. 56-59 (1969). The constitutionality of the private foundation lobbying provisions is likewise not in issue here. This case involves restrictions on *legislative* activity by *publicly-supported* charities in furtherance of their *philanthropic* objectives.

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[5] "Public charities" include churches, schools, hospitals, and other section 501(c)(3) organizations that receive a substantial part of their financial support from the general public. *See* IRC § 509(a); Treas. Reg. § 1.170A-9(h)(4)(ii). Although the term "public charity" is not defined in the Code, it has become the common shorthand expression for charitable organizations that are not private foundations.

II. The Restrictions On Charities' Legislative Activities Impose An Unconstitutional Condition On The Exercise Of First Amendment Rights.

A. The doctrine of "unconstitutional conditions" is well established in this Court's decisions and need not be elaborately rehearsed here. Obviously, not every governmental benefit derives from an underlying constitutional entitlement. But "even though a person has no 'right' to a valuable governmental benefit, and even though the Government may deny him the benefit for any number of reasons," it may not deny him the benefit "on a basis that infringes his constitutionally protected interests—especially, his interest in freedom of speech." *Perry* v. *Sindermann*, 408 U.S. 593, 597 (1972). *Accord*, *Thomas* v. *Review Board*, 450 U.S. 707, 716-18 (1981); *McDonald* v. *Paty*, 435 U.S. 618, 626 (1978); *Elrod* v. *Burns*, 427 U.S. 347, 355-59 (1976) (plurality opinion). When the Government conditions the availability of benefits on the surrender of constitutional rights, it "effectively penalizes the free exercise" of those rights, permitting it to achieve indirectly a result that it could not directly command. *Sherbert* v. *Verner*, 374 U.S. 398, 404-06 (1963). And the penalty need not be severe for the condition to be invalid: "This Court's decisions have prohibited conditions on public benefits . . . which dampen the exercise generally of First Amendment rights, however slight the inducement to the individual to forsake those rights." *Elrod*, 427 U.S. at 358 n.11.

The "unconstitutional conditions" doctrine applies with full force here. Legislative activity is clearly protected by the First Amendment. *Eastern R.R. Presidents Conf.* v. *Noerr Motor Freight, Inc.*, 365 U.S. 127, 137-38 (1961). Corporate entities possess First Amendment rights no less than individuals. *Consolidated Edison Co.* v. *Public Service Comm'n*, 447 U.S. 530, 533 (1980). And this Court

has specifically held that the "unconstitutional conditions" doctrine operates to bar the state from conditioning the availability of tax benefits on the surrender of First Amendment rights. *Speiser* v. *Randall*, 357 U.S. 513, 518-19 (1958) (rejecting the argument that, "because a tax exemption is a 'privilege' or 'bounty,' its denial [cannot] infringe speech").

The lobbying provisions of the Internal Revenue Code condition the availablity of valuable Government benefits on charities' surrender of their constitutional right to engage in "substantial" legislative advocacy. If a charitable organization is unwilling to accept this condition, it is penalized by being denied tax benefits that are accorded to all other charities—exemption from federal income tax, and the ability to solicit contributions that donors may deduct for income, estate, and gift tax purposes. Under this Court's decisions, therefore, the application of the "unconstitutional conditions" doctrine to the challenged lobbying provisions seems clear.

B. The Government in its Brief does not specifically address the "unconstitutional conditions" doctrine. Rather, it cites this Court's decision in *Cammarano* v. *United States*, 358 U.S. 498 (1959), and relies exclusively on that decision for the proposition that "this case does not involve any governmental restriction of First Amendment rights." Br. 21. The Government loads *Cammarano* with more freight than it can bear.

Cammarano involved an IRS prohibition against a business taxpayer's deduction of expenses incurred to influence legislation. The Court rejected the argument that denial of the deduction imposed an unconstitutional condition on First Amendment rights. *Id.* at 513. "Petitioners," the Court held, "are not being denied a tax deduction because they engage in constitutionally pro-

tected activities, but are simply being required to pay for those activities entirely out of their own pockets, as everyone else engaging in similar activities is required to do under the provisions of the Internal Revenue Code." *Id.* Justice Douglas elaborated this point in his concurrence:

> If Congress had gone so far as to deny *all* deductions for ordinary and necessary business expenses if a taxpayer spent money to promote or oppose [legislation], then it would be placing a penalty on the exercise of First Amendment rights. That was in substance what a State did in *Speiser* v. *Randall* . . . Congress, however, has taken no such action here. It has not undertaken to penalize taxpayers for certain types of advocacy; it has merely allowed some, not all, expenses as deductions. *Id.* at 515 (emphasis added).

The key to the Court's reasoning in *Cammarano* was the fact that the tax benefit denied (a deduction for lobbying expenses) was precisely correlated with, and directly proportional to, the lobbying activity undertaken. It was this correlation that enabled the Court to characterize the Government's denial of tax benefits as a mere unwillingness to subsidize speech, rather than as an attempt to penalize it. By lobbying, the taxpayer in *Cammarano* incurred no governmentally-imposed detriment other than the Government's refusal to pay, *via* the grant of a tax deduction, approximately half his lobbying costs. *Cammarano* holds that this is constitutionally permissible, and that is all it holds on this score.

This case differs fundamentally from *Cammarano* because it involves precisely the sort of penalty that the taxpayer in *Cammarano* could not show. The tax benefits denied to charities that engage in "substantial" lobbying are in no sense correlated with or proportional to the amount of legislative activity they undertake. The char-

ity is not merely required to pay additional tax approximating half its lobbying costs; it is required to forfeit its tax exemption, *i.e.*, to pay additional tax approximating half its total income.[6] In effect, the lobbying restrictions do to charities precisely what Justice Douglas in his *Cammarano* concurrence said the Government could not do—deny *all* tax benefits to organizations that spend money to promote legislation.[7]

Yet the penalty visited on charities that engage in "substantial" lobbying does not stop at loss of tax exempt status. The charity also loses the right to receive contributions that are tax-deductible by its donors. Whereas the taxpayer in *Cammarano* was barred from using tax-deductible funds for lobbying activity, the charity is effectively barred from using tax-deductible funds for *any* activity, be it lobbying, book publishing, or scientific research. The denial of the right to receive deductible contributions is a virtual death sentence for most charities. As this Court has noted, appearance on the IRS

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[6] The differential tax effect can best be illustrated by an example. Compare a business corporation and a charity, each with $1.1 million of income and $100,000 of lobbying expenses. Assume that each is taxed at a flat 50% rate. If the corporation is denied a deduction for its lobbying expenses, its tax bill will rise from $500,000 to $550,000. If the charity is deemed to have engaged in "substantial" legislative activity by virtue of its lobbying, its tax bill will rise from zero to $550,000, an increase 11 times as large. In the latter case, the Government's imposition of $550,000 in additional tax obviously goes beyond a mere "refusal to subsidize" the charity's lobbying outlay of $100,000.

[7] *See Harris* v. *McRae*, 448 U.S. 297, 317 n.19 (1980) (distinguishing between Congress' "refusal to fund protected activity" and its "imposition of a 'penalty' on that activity," and stating that "a substantial constitutional question would arise" if Congress sought to deny *all* Medicaid benefits to women who exercised their right to abortion).

Cumulative List of entities entitled to receive tax-deductible contributions "is a prerequisite to successful fund raising for most charitable organizations, [since] many contributors simply will not make donations to an organization that does not appear on the Cumulative List." *Bob Jones University* v. *Simon*, 416 U.S. 725, 729-30 (1974).

In sum, because of the massive and wholly disproportionate sanctions menacing charities that engage in "substantial" lobbying, the Government is mistaken in its belief that mere citation of *Cammarano* suffices to answer charities' First Amendment claims. The disproportionality of these sanctions goes beyond a "mere refusal to subsidize" legislative advocacy and generates the penalty—the *sine qua non* of the "unconstitutional conditions" doctrine—that was absent in *Cammarano*.[8]

C. The Court of Appeals recognized that *Cammarano* by itself does not represent a satisfactory answer to the "unconstitutional conditions" argument. The Court stated that the argument "would . . . be troublesome if it were the case that the government conditioned its provision of tax benefits on a charitable organization's waiver of First Amendment rights." J.S. App. 33a. In testing the validity of this premise, however, the Court said it was

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[8] The Government argues that the denial of tax benefits is "no broader than necessary to accomplish the underlying congressional purpose and [does] not 'penalize' [charities] for the content of [their] advocacy." Br. 23 n.10. This argument is phrased so as to avoid facing the key question. *Amici* do not contend that the lobbying restrictions penalize charities for *the content* of their advocacy, nor does the "unconstitutional conditions" doctrine hinge on proof of a content-based restriction. The question under *Cammarano* is whether the Government has undertaken to penalize, rather than merely declined to subsidize, speech. The challenged lobbying restrictions clearly penalize charities *for their advocacy*.

necessary to look, not only at section 501(c)(3), but also at section 501(c)(4). When these two sections are read together with *Cammarano*, the Court concluded, any suggestion that charities must waive First Amendment rights in order to receive tax benefits is "overly mechanistic." J.S. App. 34a.

Section 501(c)(4), in conjunction with section 501(a), provides a tax exemption for "social welfare organizations." Unlike charities, social welfare organizations may lobby at will without forfeiting tax-exempt status; unlike charities, however, they generally cannot receive tax-deductible contributions. The Court of Appeals suggested that a charity, taking advantage of these provisions, "can easily structure itself along dual lines," carrying on its lobbying activities through a section 501(c)(4) affiliate and conducting its other charitable activities itself. J.S. App. 34a. Under this "dual organizational structure," the Court said, a charity that lobbies incurs no greater denial of tax benefits than the taxpayer incurred in *Cammarano:* the charity continues to receive tax-deductible contributions; its income and its affiliate's income continue to be tax-exempt; but its lobbying affiliate simply cannot lobby with tax-deductible funds. It was this possibility of a binary structure that converted the governmental sanction, in the Court of Appeals' view, from a "penalty" on lobbying to a "mere refusal to subsidize" it, thus making *Cammarano's* analysis apt.

The Court of Appeals' approach hardly represents standard First Amendment analysis under the decisions of this Court. The question posed was whether charities are in fact required to waive First Amendment rights as a condition of receiving tax benefits. The Court of Appeals' answer, in effect, was to concede that a charity is indeed required to waive such rights, but to assert that, with the

aid of sophisticated tax planning, the charity can find someone else to exercise its rights for it. That course of action, however, would not protect *the charity's* rights. While this Court has often approved government regulations affecting the "time, place, and manner" of speech, it has never suggested that the Government may regulate speech by forcing an entity possessed of First Amendment rights to speak through someone else.

Indeed, this Court rejected a similar argument in *Healy* v. *James*, 408 U.S. 169 (1972). In that case, students at a state college formed a chapter of Students for Democratic Society ("SDS"). They applied to the college unsuccessfully for official recognition as a "campus organization," a status that would have permitted them to use college bulletin boards and hold meetings in campus buildings. This Court held that the college's denial of recognition violated the group's First Amendent rights. The Court rejected the contention that the group's ability to meet off campus, or to meet informally on campus in a capacity other than as a chapter of the SDS, eliminated the First Amendment problem. "The group's possible ability to exist outside the campus community," the Court concluded, "does not ameliorate significantly the disabilities imposed by the [college's] action." *Id.* at 183.

This Court's reasoning in *Healy* demonstrates that a charity cannot be compelled, consistently with the First Amendment, to exercise its free speech rights vicariously. The college in *Healy* conditioned the availability of governmental benefits (use of campus facilities) on the students' waiver of First Amendment rights (the right to associate freely as members of SDS). The fact that First Amendment rights could have been exercised indirectly—by an off-campus branch of SDS, by a different on-campus organization, or by the students individually—was found irrelevant to the constitutional

outcome. *Healy* indicates that, if an entity possesses First Amendment rights, its coerced waiver of those rights is no more acceptable, constitutionally, because of the possibility that a different entity might exercise those rights in its stead.

D. Theoretically, the Court of Appeals' approach might be reconciled with *Healy* by contending that a charity and its hypothetical lobbying affiliate, while nominally separate, would not really have to be different entities at all. If it were true that a lobbying affiliate could function as a charity's *alter ego*—as a mere paper entity or incorporated pocketbook for financing the charity's legislative program—the Court of Appeals' approach would arguably be correct. For in that event the "dual organizational structure" would not compel the charity to waive its rights and speak vicariously; the charity could continue, in essence, to exercise its rights itself.

An attempt to rationalize the Court of Appeals' approach along these lines does not withstand analysis. As a matter of law, a lobbying affiliate cannot be a mere paper entity or rubber stamp for a charitable organization without endangering the charity's tax-exempt status.

Section 501(c)(3) prohibits charities from engaging in substantial legislative advocacy. If persons connected with a charity form a section 501(c)(4) affiliate, the Service will properly insist that none of the charity's resources be used to support activities of the affiliate—such as lobbying activities—that the charity could not have conducted directly. To avoid jeopardizing the charity's tax-exempt status, therefore, the two organizations must take great care to maintain independence and separation of functions.

The nature of the relationships that may properly subsist between a public charity and a section 501(c)(4) affili-

ate is unclear under present law. Neither the Code nor the regulations provide any guidance as to whether a charity and a lobbying affiliate would be allowed to share facilities and research, to have officers and directors in common, to have complementary strategies and policy priorities. Under these circumstances, the permissible contours of the "dual organizational structure" will in practice be extensively controlled by IRS enforcement policy.

The Service's past practice, both in considering exemption requests and in auditing charitable organizations, indicates that it scrutinizes relationships between affiliates to ensure that charities do not indirectly support lobbying. The IRS has ruled that a charity and an affiliate must, at an absolute minimum, be separately incorporated and have separate records and books of account. Rev. Rul. 77-232, 1977-2 C.B. 71. The IRS has challenged (or suggested that it might challenge) a charity's tax exempt status if the charity controls the policy positions taken by a lobbying affiliate;[9] if the affiliate exploits the charity's study and research for lobbying purposes;[10] if the charity shares facilities, policy priori-

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[9] In Rev. Rul. 72-513, 1972-2 C.B. 246, the Service considered whether lobbying activity of a student-run newspaper should be imputed to the sponsoring university, a section 501(c)(3) organization, where the university provided the paper with office space and shared personnel. Although holding that imputation was not required, the Service premised its conclusion on the fact that "neither the university administration nor the [shared personnel] exercise any control or direction over the newspaper's editorial policy." *Id.* at 246.

[10] *See* IRS, Exempt Organization Handbook ¶ 392(5) (1982) (stating that "study, research, and discussion" may constitute *de facto* lobbying activity if they serve "as a preparatory stage for the advocacy of legislation").

ties, and overall strategy with the affiliate;[11] or if the charity and the lobbying organization have substantially identical directors and personnel.[12] The IRS position on these matters has fluctuated over time, and its posture at any given moment may be less restrictive than these examples suggest. However, given the Service's broad administrative discretion and the severe penalties that attend any miscalculation, a charity could not prudently control the activities of its lobbying affiliate without risking its own tax exemption. And if a charity cannot safely control the activities of its affiliate, the affiliate cannot be a proxy for exercise of the charity's First Amendment rights.

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[11] *See Center on Corporate Responsibility, Inc.* v. *Shultz*, 368 F.Supp. 863, 875-76 (D.D.C. 1973). The IRS there denied a tax exemption to a non-profit organization, citing its "sharing of personnel and office space" with a non-exempt affiliate, the two organizations' "apparent common control," their interlocking directorates, and the interrelationship of their proposed litigation and research programs. In the words of the district judge, the Service argued that the Center and its affiliate were in effect "one entity since they have the same purposes and goals, and participate in several of the same type of activities . . . to achieve those goals." *Id.* at 876. The court rejected the Service's position and held the Center entitled to exemption.

[12] In 1957, the Service audited the NAACP and its section 501(c)(3) affiliate, the NAACP Legal Defense and Educational Fund. Although the two organizations maintained a high degree of operational independence, the IRS questioned the Fund's tax-exempt status in view of its close relationship with the NAACP, which engaged in "substantial" legislative activity. In response to IRS pressure, the Fund severed all connections with its parent organization, resolving that "no person should be a Board Member, officer or employee of this corporation who is also a Board Member, officer or employee of the NAACP." *See* Memorandum of Law in Support of Defendant's Motion for Summary Judgment, *National Association for the Advancement of Colored People* v. *N.A.A.C.P. Legal Defense and Educational Fund, Inc.*, Civil Action No. 82-1424 (S.D.N.Y. 1982).

E. Quite apart from this analysis, the "dual organizational structure" envisioned by the Court of Appeals is encumbered by serious practical problems which that Court failed to consider. It would not be possible for a charity desirous of establishing a lobbying affiliate to comply with modest formal niceties and continue its operations essentially unchanged—directing its donors, as it were, simply to address contributions to a different box on the charity's organizational chart. To the contrary, the Court of Appeals' suggestion would necessitate real operating changes and impose substantial additional costs. These impediments constitute a separate and independently sufficient ground for rejecting the "dual organizational structure" as an answer to charities' First Amendment claims.

The most obvious problems imported by the "dual organizational structure" would be the considerable burdens of establishing and operating the section 501(c)(4) organization. The new entity would have to be formally incorporated under state law, secure federal tax exemption, and qualify under state charitable solicitation and exemption statutes.[13] It would have to file registration forms with most States and some localities in which it proposed to solicit contributions, and it would have to file annual reports with these governments and with the IRS. If the affiliate shared office space or personnel with the charity, detailed accounting records would have to be kept to allocate salaries, rent, and overhead expenses in

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[13] The burdens imposed by state and local solicitation laws, which typically include some combination of licensing fees, cost limitations, bonding requirements, and annual financial reports, can be severe. *See Village of Schaumburg* v. *Citizens For A Better Environment*, 444 U.S. 620, 622-25 (1980) (holding unconstitutional a municipality's imposition of fixed percentage cost restrictions on charitable solicitation).

order to convince the IRS that the charity did not subsidize the affiliate's lobbying. The vast majority of this Nation's charities are small local organizations; these organizations lack the money, tax expertise, and accounting sophistication to take such steps "easily."

Second, the proposed "dual organizational structure" would hobble the fundraising process. Fundraising appeals on behalf of the charity and its lobbying affiliate would have to be separated so as to avoid misleading donors about the deductibility of their gifts. But fundraising solicitations from similar-sounding organizations, appealing to essentially the same pool of prospective donors, present serious practical problems. Experience shows that such parallel solicitations confuse the public; alienate donors (who resent being dunned twice); and diminish the aggregate amount contributed.

Third, the proposed "dual organizational structure" would entail a very substantial increase in the charity's cost of communicating with its members. Charitable organizations qualify for special postage rates, generally about half the comparable commercial rates. U.S. Postal Service, Domestic Mail Manual § 611.2b (1982). Section 501(c)(4) organizations, by contrast, are generally not entitled to these low rates, since "promotion of social welfare" is not one of the qualifying purposes set forth in the Domestic Mail Manual. *See Sierra Club* v. *U.S. Postal Service*, 549 F.2d 1199, 1200-01 & n.2 (9th Cir. 1976). While some social welfare organizations have succeeded in qualifying on the ground that they also have "educational" purposes, it is most unlikely that the lobbying affiliate envisioned by the Court of Appeals could so qualify. By hypothesis, its sole activity will be lobbying, and the Postal Service does not regard lobbying as "educational" activity within the meaning of the Domestic Mail Manual. *See National Rifle Ass'n* v. *U.S. Postal*

Service, 407 F. Supp. 88, 90-91 (D.D.C. 1976). The lobbying affiliate's inability to secure preferential postage rates would constitute a formidable additional cost of the "dual organizational structure."

Finally, the "dual organizational structure" would create a real risk of destroying the cohesiveness of the charitable enterprise. Facing fundraising constraints, IRS scrutiny, and the need to operate independently, the charity and its lobbying affiliate will naturally tend to develop along divergent paths. A pointed example of this tendency is furnished by the NAACP and its section 501(c)(3) affilate, the NAACP Legal Defense and Educational Fund. Forced by IRS pressure to divorce their operations because of the NAACP's legislative activity, the two organizations are now suing each other in federal court. *See* p. 17 n.12 *supra*. The issue that divides them—a matter of ominous significance here—is the use for fundraising purposes of the "NAACP" name. No charity should be required to run such risks in order to exercise its First Amendment rights.

F. In sum, the "dual organizational structure" is no answer to a charity's claim that its speech has been unconstitutionally restricted. The lobbying provisions of the Code undeniably force charities to waive free speech rights as a condition of receiving tax benefits. The Court of Appeals discounted this forced waiver by reasoning that charities could establish lobbying affiliates to exercise their rights for them. Under standard First Amendment analysis, however, a charity cannot be made to find someone else to exercise its right to free speech; it is entitled to speak for itself. Nor can speech by proxy be rationalized on the theory that the affiliate would be a mere *alter ego;* a charity could control the operations of its lobbying affiliate to that extent only by risking an IRS challenge to its own tax exemption. And even if the Court

of Appeals' proposal were otherwise viable, its suggestion that a charity can "easily structure itself along dual lines" ignores the substantial costs such a reorganization would entail.

III. Tested Under The Strict Scrutiny That Is Appropriate Here, The Restrictions On Charities' Legislative Activities Must Be Invalidated.

Because they impose a condition on the exercise of First Amendment rights, the challenged lobbying provisions are subject to the "exacting scrutiny necessitated by a state-imposed restriction of freedom of speech." *First National Bank* v. *Bellotti*, 435 U.S. 765, 786 (1978). To be sustained, governmental restrictions of speech must pass a two-part test. First, the Government must show that the restrictions are justified by a compelling state interest. *Consolidated Edison Co.* v. *Public Service Comm'n*, 447 U.S. 530, 540 (1980). Second, the Government must prove that the restrictions are "closely drawn to avoid unnecessary abridgment" of First Amendment rights. *First National Bank*, 435 U.S. at 786. *Accord*, *Central Hudson Gas & Electric Corp.* v. *Public Service Comm'n*, 447 U.S. 557, 565 (1980); *Shelton* v. *Tucker*, 364 U.S. 479, 488 (1960). Tested under these criteria, the challenged lobbying restrictions cannot stand.

A. The Lobbying Restrictions Do Not Serve Any Compelling State Interest Nor Are They Closely Drawn To Serve The Interests Invoked In Their Defense.

1. The principal Government interest said to justify the challenged lobbying restrictions is the supposed need to ensure "governmental neutrality with respect to lobbying activities." J.S. App. 58a; Br. 27. This rationale has its roots in *Cammarano*, where this Court spoke of a "sharply defined national policy" that "everyone in the community should stand on the same footing as regards

[legislative activity] so far as the Treasury of the United States is concerned." 358 U.S. at 508, 512-13.

As the Court of Appeals correctly observed, the tax policy on lobbying has changed fundamentally since *Cammarano* was decided. In 1962, Congress amended the Code to permit businesses to deduct expenditures incurred in direct (non-grassroots) lobbying. *See* IRC § 162(e).[14] Members of labor unions and trade associations can now deduct under section 162 the portion of their dues expended on direct lobbying. Treas. Reg. § 1.162-20(c)(3). And veterans' organizations can lobby without restriction yet retain their full panoply of tax benefits, a situation that existed in 1959 but that apparently was not called to this Court's attention. Whatever may have been true in the past, the Government no longer maintains toward lobbying what Justice Douglas in *Cammarano* described as "a complete hands-off policy." 358 U.S. at 515.

Moreover, even if neutrality remained a compelling state interest, the challenged lobbying restrictions are not "narrowly drawn" to serve it. *Village of Schaumburg*, 444 U.S. at 637. The essence of the neutrality policy described in *Cammarano* was that the Treasury would refrain from subsidizing speech; everyone in the community would "simply [be] required to pay for [his lobbying] activities entirely out of [his] own pockets." 358 U.S. at 513. The challenged restrictions, however, cannot be de-

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[14] Representatives of the American Bar Association described the effect of this amendment: "Now that direct business lobbying has become a deductible activity under section 162(e), the former 'neutral posture of the tax law with respect to lobbying' . . . has been upset in favor of the business interests as opposed to the charitable organizations." Statement of the American Bar Association, *Influencing Legislation by Public Charities: Hearings on H.R. 13500 Before the House Comm. on Ways and Means*, 94th Cong., 2d Sess. 68 (1976).

scribed as a mere refusal to subsidize charities' legislative advocacy; they affirmatively penalize charitable lobbying. *See* pp. 10-12 *supra*. Obviously, the Government is not neutral about legislative activity when it penalizes people for engaging in it.

2. A second governmental objective said to justify restrictions on charities' legislative activities is "prevention of abuse." J.S. App. 58a. It is important to be clear on the nature of the "abuse" referred to. As noted previously, legislative advocacy in furtherance of a charity's philanthropic purposes is entirely proper. It cannot be contended, therefore, that charitable lobbying is *inherently* abusive, or that limitations on such lobbying are justifiable as restricting charities to their proper "charitable" sphere.[15] The abuse to be prevented, rather, is the abuse that triggered enactment of the lobbying provisions in 1934—the "abuse of charitable lobbying by private interests." J.S. App. 58a. As one of the bill's spokesmen said, "There is no reason in the world why a contribution [should be deductible] if it is a selfish one made to advance the personal interests of the giver of the money." 78 Cong. Rec. 5861 (1934) (Sen. Reed).

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[15] Both the dissent below, J.S. App. 96a-97a, and the Government, Br. 23 n.10, suggest that lobbying represents a "nonexempt purpose" for a charity, *i.e.*, that lobbying is inherently "noncharitable." This suggestion confuses means with ends, activities with purposes. Legislative activity is employed by charities as a means to achieve a goal; if the goal is "charitable," a charity is engaged in "charitable" activity when it pursues that goal by any proper means, be it legislative action or action of some other sort. *See* pp. 3-6 *supra*. Indeed, Congress' enactment in 1976 of section 501(h), which permits charities (other than churches, excluded at their own request) to devote up to 20% of their "exempt purpose expenditures" to influencing legislation, makes it clear that Congress does not view lobbying as a "nonexempt purpose" or as "noncharitable" *per se*. *See* p. 26 *infra*.

Amici agree that preventing abuse of charitable lobbying by private interests is a valid governmental objective. But this objective is not rationally advanced by blanket restrictions on the legislative activity of every charity in the Nation. The Government may pursue its legitimate objectives, but it "must do so by narrowly drawn regulations designed to serve those [objectives] without unnecessarily interfering with First Amendment freedoms." *Village of Schaumburg*, 444 U.S. at 637. The IRS already has at its disposal, entirely apart from the lobbying restrictions, "narrowly drawn" means of accomplishing Congress' goal.

No organization can secure and maintain tax exemption as a "public charity" unless it passes three qualifying tests. It must be organized and operated exclusively for public purposes rather than "for the benefit of private interests." Treas. Reg. § 1.501(c)(3)-1(d)(1)(ii). No part of its resources may "inure to the benefit of any private shareholder or individual." IRC § 501(c)(3). And it must have broad public support. IRC § 509(a); Treas. Reg. § 1.509(a)-3(a). The separate prohibitions against private benefit, coupled with the necessity of retaining widespread public support, are sufficient to ensure that public charities steer clear of the abuse Congress aimed to prevent in 1934. If a charity is unfaithful to its trust—if it lobbies on behalf of private interests, or engages in other activity designed to further private interests—the answer is to revoke its tax exemption because it is not "operated exclusively for charitable purposes" within the meaning of section 501(c)(3). The answer is not to restrict the legislative activity of all public charities in the Nation.

In sum, while "prevention of abuse" represents a valid governmental objective, the challenged lobbying restrictions are not "closely drawn" to serve that goal. The vice

of charitable lobbying in furtherance of private interests is not that it is lobbying, but that it is not "charitable." It is unjustifiable to restrict the First Amendment rights of all charities out of fear that some may employ legislative activity—an entirely proper means—to an improper end. As applied to public charities, the lobbying restrictions are plainly unconstitutional.

3. Other governmental interests said to support the challenged lobbying provisions are weak, if not improper. The Government contends that the restrictions are needed to preserve "balance" between the lobbying activities of charitable organizations and other groups. Br. 27. Alternatively, the Government suggests that Congress, absent the lobbying provisions, will be overwhelmed by the emissaries of philanthropy. *See* Br. 8; p. 6 n.4 *supra*. But "the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment." *Buckley* v. *Valeo*, 424 U.S. at 48-49. By enacting section 162(e), Congress has extended its welcome to lobbyists from business and labor. Any attempt to restrict the access of other speakers in the interests of some notional "balance" is not a constitutionally valid objective, much less a compelling governmental interest.

B. Section 501(h) Is Irrelevant To The Constitutionality Of The Challenged Lobbying Restrictions.

In his dissent below, Judge MacKinnon argued that Code section 501(h), enacted in 1976, provides "a source of guidance in evaluating the existing scope of section 501(c)(3)" and "compels the conclusion that section 501(c)(3) is valid." J.S. App. 101a & n.25. The Government similarly contends that section 501(h) "represents a considered accommodation" between charities' First

Amendment rights and its need to restrict lobbying. Br. 38-39 n.20. The Court of Appeals rejected these arguments, holding that section 501(h) was not before it and was "of little relevance" to the question presented here. J.S. App. 19a n.6. The Court of Appeals was correct.

Section 501(h) permits charities to elect to have their legislative activity restricted by percentage limitations rather than by the vague contours of the "substantial" test.[16] Public charities, other than churches and church-affiliated organizations, may elect its coverage. IRC § 501(h)(5). An electing charity may generally devote, without penalty, a specified percentage of its "exempt purpose expenditures" to lobbying; the specified percentage is determined by a sliding scale, beginning at 20% for the smallest organizations and approaching 5% for the largest. IRC § 4911(c)(2). Regardless of these percentage limitations, no organization's permissible expenditures (either for direct or grassroots lobbying) may exceed a fixed dollar ceiling. IRC § 4911(c)(2) & (4). "Excess lobbying expenditures" are subject to a 25% excise tax. IRC § 4911(a)(1). A charity that normally exceeds the limitations by specified amounts loses its tax exemption. IRC § 501(h)(1).

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[16] Neither the Code nor the regulations suggest any percentage equivalent for the quantum of legislative activity that will be deemed "substantial," and the courts have almost uniformly refused to provide one. *See, e.g., Haswell* v. *United States*, 500 F.2d 1133, 1142 (Ct. Cl. 1974), *cert. denied*, 419 U.S. 1107 (1975) (holding a percentage test "inappropriate"); *Christian Echoes Nat'l Ministry* v. *United States*, 470 F.2d 849, 855 (10th Cir.), *cert. denied*, 414 U.S. 864 (1973). *But see Seasongood* v. *Commissioner*, 227 F.2d 907 (6th Cir. 1955) (holding 5% "insubstantial"). The IRS takes the position that the determination of substantiality "is a factual one, and there is no simple rule as to what amount of activities is substantial." IRS, Exempt Organization Handbook ¶ 394(1) (1982) (rejecting 5% test).

This case involves the constitutionality of the "substantial" test of section 501(c)(3), not the constitutionality of section 501(h). The "substantial" test and section 501(h) impose discrete sets of restrictions on charitable lobbying. Appellee's legislative activity is in fact restricted by the "substantial" test, because appellee did not elect coverage under section 501(h). J.A. App. 19a n.6. The legislative activity of most section 501(c)(3) organizations is in fact restricted by the "substantial" test, because only about 7% of the Nation's eligible charities have elected coverage under section 501(h), owing mainly to the complexity of the attendant rules and the burdensomeness of the reporting and recordkeeping requirements.[17] And the legislative activity of many section 501(c)(3) organizations is *necessarily* restricted by the "substantial" test, since churches and church-affiliated organizations are not even allowed to elect coverage under section 501(h). The "substantial" test, in short, is either constitutional or it is not. Its validity cannot logically be affected by the constitutionality of another Code section which does not apply to appellee, which does not apply to most charities, which cannot apply to many charities, and which is not contested here.

Even if section 501(h) were relevant, it would make no difference in assessing the constitutionality of the challenged lobbying restrictions. Section 501(h) simply imposes a new set of limitations on legislative activity in lieu of those imposed by section 501(c)(3). For smaller charities, the section 501(h) limitations are probably less

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[17] Recent IRS information indicates that at most 16,162 charities (of approximately 234,000 eligible charities) elected coverage of section 501(h) between January 1977 and June 1982. The number of charities actually electing coverage is probably smaller; elections and revocations of elections are effected on the same IRS form, and the Service merely counts the number of forms filed.

restrictive in percentage terms than those of the "substantial" test; for larger charities they are probably more so, owing to the fixed dollar ceiling. As the Court of Appeals correctly noted, however, "all charities . . . continue to have their lobbying restricted under one standard or the other," J.S. App. 19a & n.6; and all charities that lobby beyond a congressionally-approved level face penalties, including loss of tax exemption and the right to receive deductible contributions, under one standard or the other. Section 501(h), while importing new ambiguities of its own,[18] may mitigate the vagueness of the "substantial" test for charities that are able and willing to elect it. But it has no effect, *in principle*, on the "unconstitutional conditions" argument. It simply changes the mix of restrictions and penalties that afflict legislative activity by a given charity of a given size on a given set of facts.

C. The Proper Remedy Is To Invalidate The Challenged Lobbying Restrictions.

The restrictions on legislative activity contained in section 501(c)(3) violate public charities' First Amendment rights. The portion of section 501(c)(3) that conditions the grant of tax benefits on proof that "no substantial part of [a charity's] activities . . . is carrying on propaganda, or otherwise attempting, to influence legislation" should accordingly be declared unconstitutional.

The Court of Appeals, having decided this case on Equal Protection rather than First Amendment grounds, faced a choice of constitutional remedies. Instead of selecting a remedy itself, it remanded the case to the

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[18] The Treasury's regulations under section 4945, defining terms similar to those used in sections 509(h) and 4911, proliferate over seven pages of elaborate (and controversial) definitions. *See* Treas. Reg. § 53.4945-2.

district court "with the instruction that it cure the constitutionally invalid operation of Section 501(c)." J.S. App. 77a. The Government characterizes the remand as the "imposition of the duties and responsibilities of a legislative committee upon a federal district court." Br. 10-11. The Government's "separation of powers" concerns, tenuous in any event, simply disappear if this case is decided on First Amendment grounds. There is in that event no choice of remedies; the only remedy—which flows inevitably from the nature of the constitutional defect—is to declare the "substantial" test invalid.[19]

The First Amendment remedy possesses obvious advantages over its Equal Protection counterpart. It deals surgically with the constitutional defect; it avoids comparison among nonprofit organizations; it carries no adverse consequences for persons not before the Court; and it avoids the line-drawing problems that are particularly awkward in the tax field. *Amici* respectfully urge this Court to adopt the First Amendment remedy here.

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[19] Invalidation of the "substantial" test does not mean that Congress is incapable of crafting a valid lobbying provision. As noted above, the Government has a legitimate interest in preventing "abuse of charitable lobbying by private interests." *See* p. 24 *supra*. Thus, a provision that barred charities from engaging in legislative activity that did not further their charitable objectives would possess no First Amendment infirmity.

CONCLUSION

The judgment of the Court of Appeals should be affirmed as to the unconstitutionality of section 501(c)(3), and modified to eliminate remand to the District Court.

Respectfully submitted,

*THOMAS A. TROYER
H. DAVID ROSENBLOOM
ALBERT G. LAUBER, JR.
CAPLIN & DRYSDALE, CHARTERED
1101 Seventeenth Street, N.W.
Washington, D.C. 20036
202/862-5000
Attorneys for *Amici Curiae*
*Counsel of Record

JOHN G. MILLIKEN
PAUL E. BOUSQUET
WINSTON & STRAWN
2550 M Street, N.W.
Washington, D.C. 20037
202/828-8400
Of Counsel

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Supreme Court of the United States

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Donald T. Regan, Secretary of the Treasury, et al.,
Appellants,

v.

Taxation With Representation of Washington,
Appellee.

On Appeal From The United States Court of Appeals
For The District of Columbia Circuit

BRIEF OF THE AMERICAN LEGION AS AMICUS CURIAE

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* Mitchell Rogovin
George T. Frampton, Jr.
Vicki C. Jackson

Rogovin, Huge & Lehrfam
A Professional Corporation
1730 Rhode Island Avenue, N.W.
Suite 1100
Washington, D.C. 20036
(202) 466-6464

* *Counsel of Record for The American Legion*

Of Counsel
Sherman G. Davis, Esquire
700 North Pennsylvania Street
Indianapolis, Indiana 46204

Stephen G. Breyer, Esquire
1730 K Street, N.W.
Washington, D.C. 20006

TABLE OF CONTENTS

	Page
INTEREST OF AMICUS CURIAE	1
STATUTES INVOLVED	3
SUMMARY OF ARGUMENT	4
ARGUMENT	
I. THE COURT BELOW ERRED IN HOLDING THAT THE LOBBYING RESTRICTIONS OF § 501(c)(3) OF THE INTERNAL REVENUE CODE OFFEND EQUAL PROTECTION PRINCIPLES BECAUSE CONGRESS HAS NOT ENACTED SIMILAR RESTRICTIONS ON VETERANS ORGANIZATIONS	7
A. The Court Of Appeals Erred In Applying The Compelling Interest Standard To These Tax Classifications	7
B. Even Under A Rigorous Standard Of Review, The Tax Code Classifications Between Veterans Groups And § 501(c)(3) Organizations Pass Muster	12
II. THE REMAND ORDERED BY THE COURT OF APPEALS EXCEEDS THE SCOPE OF THE DISTRICT COURT'S JURISDICTION PURSUANT TO 26 U.S.C. § 7428 AND RAISES CONSTITUTIONAL PROBLEMS	19
CONCLUSION	30

TABLE OF AUTHORITIES

Cases	Page
Alexander v. "Americans United" Inc., 416 U.S. 752 (1974)	21
Aptheker v. Secretary of State, 378 U.S. 500 (1964)	27
Basic Unit Ministry of Schurig v. Commissioner, 670 F.2d 1210 (D.C. Cir. 1982)	22
Big Mama Rag, Inc. v. United States, 631 F.2d 1030 (1980)	23
Bob Jones University v. Simon, 416 U.S. 725 (1974)	21
Buckley v. Valeo, 424 U.S. 1 (1976)	10, 11
Calhoon v. Harvey, 379 U.S. 134 (1964)	23
Califano v. Yamasaki, 442 U.S. 682 (1979)	24
Califano v. Westcott, 443 U.S. 76 (1979)	24-29
Cammarano v. United States, 358 U.S. 498 (1959)	13
Cannon v. University of Chicago, 441 U.S. 677 (1979)	23
Cheng Fan Kwok v. INS, 392 U.S. 206 (1968)	20
Chrysler Corp. v. Brown, 441 U.S. 281 (1979)	23
Clements v. Fashing, 102 S. Ct. 2836 (1982)	10
CREATE, Inc. v. Commissioner, 634 F.2d 803 (5th Cir. 1981)	22
Ford Motor Credit Co. v. Cenance, 452 U.S. 155 (1981)	20
Hansberry v. Lee, 311 U.S. 32 (1940)	27
Harris v. McRae, 448 U.S. 297 (1980)	11
Haswell v. United States, 500 F.2d 1133 (Ct. Cl. 1974), *cert. denied*, 419 U.S. 1107 (1975)	13
Hecht Co. v. Bowles, 321 U.S. 321 (1944)	23
Iowa-Des Moines National Bank v. Bennett, 284 U.S. 239 (1931)	26
Jefferson v. Hackney, 406 U.S. 535 (1972)	10
Kahn v. Shevin, 416 U.S. 351 (1974)	7
Lehnhausen v. Lake Shore Auto Parts Co., 410 U.S. 356 (1973)	7
Madden v. Kentucky, 309 U.S. 83 (1940)	7
Maher v. Roe, 432 U.S. 464 (1977)	11
Marchetti v. United States, 390 U.S. 39 (1968)	29
McDonald v. Board of Election, 394 U.S. 802 (1969)	10

TABLE OF AUTHORITIES—Continued

	Page
National Alliance v. United States, 81-1 U.S.T.C. ¶ 9464 (D.D.C. 1981)	23
National Railroad Passenger Corp. v. National Association of Railroad Passengers, 414 U.S. 453 (1974)	23
Northern Pipeline Construction Co. v. Marathon Pipeline Co., 102 S. Ct. 2858 (1982)	28
Porter v. Warner Holding Co., 328 U.S. 395 (1946)	23
Rogers v. County of Hennepin, 240 U.S. 184 (1916)	7
San Antonio Independent School District v. Rodriguez, 411 U.S. 1 (1973)	7
Scripps-Howard Radio v. FCC, 316 U.S. 4 (1942)	24
Securities Invester Protection Corp. v. Barbour, 421 U.S. 412 (1975)	23
Simon v. Eastern Kentucky Welfare Rights Organization, 426 U.S. 26 (1976)	27
Skinner v. Oklahoma ex rel. Williamson, 316 U.S. 535 (1942)	25, 26
Slee v. Commissioner, 42 F.2d 184 (2d Cir. 1930)	8
Southwest Virginia Professional Standards Review Organization, Inc. v. United States, 78-2 U.S.T.C. ¶ 9747 (D.D.C. 1978)	22
Touche Ross & Co. v. Redington, 442 U.S. 560 (1979)	20
United States v. Maryland Savings-Share Insurance Corp., 400 U.S. 4 (1970)	7
United States v. Reese, 95 U.S. 214, 221 (1875)	27
United States v. Robel, 389 U.S. 258 (1967)	25, 28
Urantia Foundation v. Commissioner, 684 F.2d 521 (7th Cir. 1982)	22
Virginia Professional Standards Review Foundation v. Blumenthal, 466 F. Supp. 1164 (D.D.C. 1979)	22
Welsh v. United States, 398 U.S. 333 (1970)	24, 25, 28
Williams v. Rhodes, 393 U.S. 23 (1968)	26
Williamson v. Lee Optical, Inc., 348 U.S. 483 (1955)	10

TABLE OF AUTHORITIES—Continued

Statutes Page

26 U.S.C. § 170 ..... 2, 8, 22
26 U.S.C. § 501(c)(3) ..... *passim*
26 U.S.C. § 501(c)(4) 2, 8, 22, 29
26 U.S.C. § 501(c)(8) 8
26 U.S.C. § 501(c)(19) 1, 2, 10, 22, 29
26 U.S.C. § 501(h) 9, 17, 25, 29
26 U.S.C. § 501(h)(2)(A) 17
26 U.S.C. § 2055 ..... 2, 8, 22
26 U.S.C. § 2522 ..... 2, 8, 22
26 U.S.C. § 4911(d)(2)(B) 17
26 U.S.C. § 4945 ..... 8, 9
26 U.S.C. § 7421(a) 19
26 U.S.C. § 7428 ..... 3, 5, 6, 19-29
26 U.S.C. § 7428(b)(1) 19
28 U.S.C. § 2201 19
36 U.S.C. § 41-51 ..... 1, 15
36 U.S.C. § 45 1
36 U.S.C. § 49 16
36 U.S.C. §§ 1101-1103 16
38 U.S.C. § 3402(a) 28
Pub. L. No. 66-47, 41 Stat. 284 (1919) 1
Pub. L. No. 67-98, 42 Stat. 227 (1921) 2

Rules

Fed. R. Civ. P. 19 27
Sup. Ct. R. 36 1

Legislative Materials

78 Cong. Rec. (1934)

5861 9
5959 9

Legislative Activity By Certain Types of Exempt Organizations, Hearings Before the House Ways and Means Committee, 92d Cong., 2d Sess. (1972) 9, 13, 14

General Tax Reform, Hearings Before the House Ways and Means Committee, 93d Cong., 1st Sess. (1973) 9, 14

TABLE OF AUTHORITIES—Continued

Page

Proposals for Administrative Changes in Internal Revenue Service Procedures, Hearings Before the Subcommittee on Oversight of the House Ways and Means Committee, 94th Cong., 1st Sess. (1975) 15, 21

Influencing Legislation By Public Charities, Hearings Before the House Ways and Means Committee, 94th Cong., 2d Sess. (1976) 9, 13, 14, 25, 28

S. Rep. No. 1082, 92d Cong., 2d Sess. (1972) 10

S. Rep. No. 938, 94th Cong., 2d Sess. (1976) 20, 23

Miscellaneous

Constitution and By-Laws of the American Legion, art. II, § 2 18

2 Cum. Bull. 152 (1920) 8

Proceedings of 63d National Convention of the American Legion, H.R. Doc. No. 131, 97th Cong., 2d Sess. (1981) 16

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

No. 81-2338

DONALD T. REGAN, SECRETARY OF THE TREASURY, ET AL.,

v. *Appellants,*

TAXATION WITH REPRESENTATION OF WASHINGTON,

Appellee.

On Appeal From The United States Court of Appeals For The District of Columbia Circuit

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BRIEF OF THE AMERICAN LEGION AS AMICUS CURIAE

INTEREST OF AMICUS CURIAE [1]

The American Legion, chartered by Special Act of Congress in 1919, Pub. L. No. 66-47, 41 Stat. 284, is the single largest organization of veterans in the United States. Its membership is open to those who have served in the military services during World War I, World War II, or the Korean or Vietnam conflicts, provided that they were honorably discharged or separated, or continued to serve honorably. 36 U.S.C. § 45. The Legion's criteria for membership, set forth in this statute, have been amended from time to time by Congress. See 36 U.S.C. § 51. In addition to its 2,400,000 members, the Legion

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[1] Pursuant to Supreme Court Rule 36, written consent to the filing of this Brief has been obtained from counsel for all parties, and the letters of consent have been filed with the Clerk of the Court.

is made up of 15,800 posts and 58 departments located in states across the land and in seven foreign countries.

The Legion and its subsidiaries are exempt from federal income taxation under § 501(c)(19)[2] of the Internal Revenue Code of 1954 (as amended), 26 U.S.C. § 501(c)(19), and contributions to the Legion are deductible for income, estate and gift tax purposes, 26 U.S.C. §§ 170, 2055, 2522. The Legion has a legislative office in Washington, D.C. and a legislative program relating to specified issues of direct interest and benefit to its members. And the Legion receives a small portion of its income from deductible bequests or contributions.

In its *en banc* decision, the Court of Appeals recognized that its ruling vitally affected the interests of veterans' groups. After concluding that there was a constitutionally objectionable "differential" in tax treatment of § 501(c)(3) organizations and veterans' organizations, the Court of Appeals concluded that "[t]he most obvious remedy—striking down the Section 501(c)(3) lobbying limitation that now governs Taxation [appellee]—poses the most obvious problems," in view of Congress' intent to regulate the amount of tax deductible dollars going to § 501(c)(3) organizations for lobbying. App. 73a.[3] Stating that this Court had "recognized" that "[unconstitutional] unequal treatment" could be cured by taking benefits "away from a preferred group," it remanded the case to the District Court with a strong suggestion that "the preferential treatment now accorded

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[2] Prior to the enactment of § 501(c)(19), the Legion was recognized as tax exempt under § 501(c)(4). Since 1921, contributions to the Legion and its posts and auxiliaries have been deductible from the taxable income of the contributors. Pub. L. No. 67-98, § 214(a)(11), 42 Stat. 227, 241 (1921).

[3] Citations to the decision of Court below, reprinted in the Appendix to the Government's Jurisdictional Statement, are cited as "App. ——."

the lobbying of veterans' organizations" be eliminated. App. 75a-76a.

If this Court were to affirm the Court of Appeals' conclusion that any disparity in treatment between veterans' groups and other non-profit organizations is in fact unconstitutional, or its further conclusion that the "most logical" remedy would be to impose restrictions on lobbying activity by veterans' groups which Congress did not enact, then in either event the Legion's current tax status and freedom to carry on legislative activity without governmental regulation would be substantially impaired. Such a result would be incompatible with the historical record concerning Congress' reasons for treating veterans' groups differently from other tax-exempt organizations and indeed, with the general recognition that, because of their unique role in our society, veterans and veterans' organizations may and should be subject to special regulation and recognition. Amicus sought to protect its interests in this matter by moving to intervene in the Court of Appeals and in this Court. Both motions were denied. 102 S. Ct. 2952 (1982); *TWRW v. Regan*, No. 79-1464 (D.C. Cir. May 27, 1982). Nevertheless, it is plain for all the reasons set forth above that Amicus has a vital interest in the disposition of this case.

STATUTES INVOLVED

In addition to the statutes set forth in Appendix D of the government's Jurisdictional Statement, Section 7428 of the Internal Revenue Code of 1954 (26 U.S.C.) is at issue here. In relevant part it provides that:

> (a) Creation of remedy.—In a case of actual controversy involving—
>
> (1) a determination by the Secretary—
>
> (A) with respect to the initial qualification or continuing qualification of an organization as an organization described in section 501(c)(3) which is exempt from tax under section 501(a)

> or as an organization described in section 170 (c) (2), . . .
>
> upon the filing of an appropriate pleading, the United States Tax Court, the United States Court of Claims, or the district court of the United States for the District of Columbia may make a declaration with respect to such initial qualification or continuing qualification or with respect to such initial classification or continuing classification. . . .
>
> (b) Limitations.—
>
> (1) Petitioner. A pleading may be filed under this section only by the organization the qualification or classification of which is at issue. . . .

SUMMARY OF ARGUMENT

I. Tax code classifications subject to equal protection challenge will generally be sustained if they rationally further a legitimate purpose. Under this standard of review, the numerous differences in treatment under the Internal Revenue Code between veterans' organizations and other exempt organizations, including restrictions on lobbying activity, plainly pass constitutional muster. The predicate for the Court of Appeals' contrary holding was a simple misreading of the legislative history, which shows that in 1934, Congress deliberately and intentionally limited the lobbying restrictions to those organizations now set forth in § 501(c)(3). This congressional decision has been adhered to, following legislative hearing and inquiry, through recent major revisions of the lobbying limits imposed on § 501(c)(3) organizations. The Court of Appeals' erroneous conclusion that traditional equal protection scrutiny will not suffice here is inconsistent with this Court's decisions that government subsidies affecting fundamental rights need not meet the "compelling interest" test.

Even a more rigorous review of this classification will sustain the legislative judgment that veterans' organiza-

tions simply do not pose the kinds of dangers with which Congress was concerned in imposing lobbying restrictions on § 501(c)(3) organizations—to wit, permitting essentially private interest lobbying by wealthy individuals who, by virtue of substantial deductible contributions, could control small § 501(c)(3) organizations lacking effective membership control. The major veterans' organizations are congressionally chartered and subject to special reporting requirements and congressional oversight not applicable to § 501(c)(3) organizations. Such organizations tend to have strict internal controls to assure that their constituent members' views are fairly represented; the Legion, for example, will not lobby on any issue unless its membership has formally authorized its leadership to take such action. Because the lobbying activity of the American Legion, like other veterans' groups, reflects the welfare and interests of veterans—a large and substantial group—it cuts across racial, political, and occupational lines, and many other special interest criteria. Moreover, veterans' organizations like the American Legion, and unlike many § 501(c)(3) organizations, do not depend for their financial support on deductible contributions from small groups of wealthy individuals, or from a floating general public which cannot demand accountability, but rather are principally supported by membership contributions.

A substantial basis thus existed for Congress' conclusion that the special dangers posed by § 501(c)(3) organizations engaging in lobbying were not present in lobbying by veterans' organizations. Regardless of whether the standard of review is that of rationality, or something more rigorous, no equal protection violation is present.

II. The remedial order of the Court of Appeals was in any event erroneous. This case was brought under § 7428 of the Internal Revenue Code, which limits the relief that may be granted to a declaratory judgment on the issue of whether the Service's denial of an application

for § 501(c)(3) status, by the particular organization whose qualification is at issue, was proper. If the legislative scheme *were* unconstitutional, appellee would simply have been entitled to a declaratory judgment that its application for exemption had been wrongly denied. It would then be left to Congress to determine whether it wished to remedy the unconstitutionality perceived by the Court of Appeals by eliminating the § 501(c)(3) lobbying restrictions, or by extending restrictions to veterans' organizations, or through some other means.

The Court of Appeals' remand order not only contravenes § 7428, but suffers constitutional defects. The Court of Appeals has virtually commanded the District Court to ignore the constitutional limitations on its authority, invade the prerogatives of the legislative branch, and engage in the kind of policy judgments, legislative hearings, and social balancing that are preeminently legislative tasks. It has done so, moreover, in a matter in which the interests of those groups likely to be directly and adversely affected by the remedy advocated by the Court of Appeals have never had an opportunity to participate as parties in the presentation and development of the issues. By urging a remedy that is detrimental to nonparties, and not even sought by any of the parties to the litigation, the Court of Appeals has egregiously overstepped limitations on its authority imposed by Article III of the Constitution.

ARGUMENT

I. THE COURT BELOW ERRED IN HOLDING THAT THE LOBBYING RESTRICTIONS OF § 501(c)(3) OF THE INTERNAL REVENUE CODE OFFEND EQUAL PROTECTION PRINCIPLES BECAUSE CONGRESS HAS NOT ENACTED SIMILAR RESTRICTIONS ON VETERANS ORGANIZATIONS.

A. The Court Of Appeals Erred In Applying The Compelling Interest Standard To These Tax Classifications.

This Court has consistently held that legislative classifications in the tax code normally will be sustained against equal protection challenge if such classifications bear a rational relationship to a legitimate governmental purpose. *E.g.*, *Kahn v. Shevin*, 416 U.S. 351, 355 (1974); *Lehnhausen v. Lake Shore Auto Parts Co.*, 410 U.S. 356, 359-65 (1973); *United States v. Maryland Savings-Share Insurance Corp.*, 400 U.S. 4, 6 (1970); *Rogers v. County of Hennepin*, 240 U.S. 184, 192 (1916). As the Court has frequently emphasized:

> The broad discretion as to classification possessed by the legislature in the field of taxation has long been recognized . . . [and] the presumption of constitutionality can be overcome only by the most explicit demonstration that a classification is a hostile and oppressive discrimination against particular persons and classes.

San Antonio Independent School District v. Rodriguez, 411 U.S. 1, 40-41 (1973) (quoting *Madden v. Kentucky*, 309 U.S. 83, 87-88 (1940)). Such a standard of review is virtually required to avoid massive judicial tinkering with the innumerable legislative judgments embodied in the federal tax code, including those relating to the twenty-two different categories of exempt organizations set forth in § 501(c).

Singling out from this group only § 501(c)(3) and veterans' organizations,[4] the Court of Appeals suggested

that Congress' failure to apply to the latter the identical lobbying restrictions imposed on the former was not only inexplicable, but inadvertent, and thus could not pass muster even under the "rationality" test. This was a complete misreading of the legislative history, which shows that Congress has acted deliberately and with good reason to impose lobbying restrictions only on § 501 (c) (3) organizations.

Prior to 1934 there were no statutory limits on lobbying by any exempt organization.[5] During Senate debate of the provisions in the 1934 Revenue Act permitting deductions for charitable contributions, an amendment was proposed to restrict those organizations now included in § 501(c)(3) from engaging in substantial lobbying or partisan political activities. The amendment was prompted by the Senate Finance Committee's observation that "there are certain organizations which are receiving contributions in order to influence legislation and carry

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[4] The dichotomy in treatment perceived by the Court of Appeals between veterans' and § 501(c)(3) organizations is illusory in the context of the numerous distinctions in the Code. Thus, fraternal benefit organizations, exempt under § 501(c)(8) without regard to their lobbying activities, may receive deductible contributions for certain charitable purposes. 26 U.S.C. §§ 170(c)(4), 2522(a)(3). *But see* 26 U.S.C. § 2055(a)(3). The tax code distinguishes among veterans' organizations themselves, *comp.* 26 U.S.C. § 2055(a)(4) *with id.*, § 2522(a)(4). And a broad range of organizations qualify for exemption under § 501(c)(4) and may engage in unrestricted lobbying activities, funded by income exempt from taxation, though they cannot receive deductible contributions. On the other hand, among § 501(c)(3)'s, private foundations, unlike public charities, cannot engage in any lobbying without incurring tax liability. 26 U.S.C. § 4945.

[5] Revenue regulations took the position that the requirement that an exempt entity be organized and operated *exclusively* for exempt purposes totally precluded political activity. 2 Cum. Bull. 152, 154 (1920). However, in *Slee v. Comm'r*, 42 F.2d 184, 185 (2d Cir. 1930), the court left room for some "agitation" which "is ancillary to the end in chief." The 1934 amendment, discussed in text, has been regarded as codifying this formulation.

on propaganda. The committee thought there ought to be an amendment which would stop that . . ." 78 Cong. Rec. 5959 (1934). Some senators felt that the amendment should be extended to all categories of organizations eligible to receive deductible contributions, including "war organizations", *id.* at 5861, but others felt that even in its more limited form, the amendment was drawn too broadly to cover organizations "not acting from selfish motives" where there was less danger of their simply "advanc[ing] the personal interests of the giver of money." *Id.* Following these discussions, the Senate passed the lobbying amendment without change and, after the House deleted reference to partisan politics, it was enacted into law. Since the precise question of an extension of the restriction to other organizations was considered and rejected, it can only be concluded that Congress acted intentionally not to apply the restrictions to all such organizations.

Congress has recently re-examined and adhered to this decision. In 1976, following several years of hearings, Congress enacted § 501(h) of the tax code, 26 U.S.C. § 501(h). Rather than adopting proposals to substantially eliminate the lobbying restrictions on § 501(c)(3) organizations, or to extend such restrictions to other entities, Congress decided to permit most § 501(c)(3) organizations to elect to expend specified percentages of their budget on lobbying expenditures, thus liberalizing, but not entirely eliminating, prior tax code treatment of such lobbying.[6] During the same time frame, moreover,

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[6] *See generally Influencing Legislation By Public Charities, Hearings Before the House Ways and Means Comm.*, 94th Cong., 2d Sess. 61 (1976) [hereinafter cited as "Hearings 1976"]; *General Tax Reform Hearings Before the House Ways and Means Comm.*, 93d Cong., 1st Sess. (1973) [hereinafter cited as "Hearings 1973"]; *Legislative Activity By Certain Types of Exempt Orgs., Hearings Before the House Ways and Means Comm.*, 92d Cong., 2d Sess. (1972) [hereinafter cited as "Hearings 1972"]. The 1976 legislation followed an earlier review of lobbying activities by exempt organizations that resulted in a virtual total ban on lobbying by private foundations in 1969. *See* 26 U.S.C. § 4945.

Congress created a specific statutory exemption for veterans' organizations, 26 U.S.C. § 501(c)(19), in order to exempt such organizations from "unrelated business income tax" on income received from bona fide members' insurance programs. Congress specifically indicated, however, that such sheltered income could not be used for "lobbying." S. Rep. No. 1082, 92d Cong., 2d Sess. 5 (1972).

Congress has thus acted deliberately over nearly half a century to regulate the flow of tax-deductible dollars through exempt organizations for lobbying purposes, focusing particularly on § 501(c)(3) organizations where the danger for large-scale abuse seemed greatest, and imposing a variety of restrictions on other exempt organizations in response to particular needs and problems. Especially under traditional analysis, the Equal Protection Clause permits the government to regulate "one step at a time," addressing itself to "the phase of the problem which seems acute." *Buckley v. Valeo*, 424 U.S. 1, 105 (1976), (quoting *Williamson v. Lee Optical, Inc.*, 348 U.S. 483, 489 (1955)). It "need not run the risk of losing an entire remedial scheme simply because it failed, through inadvertence or otherwise, to cover every evil that might conceivably have been attacked." *McDonald v. Board of Election*, 394 U.S. 802, 809 (1969). Even if the statute focuses upon " 'one phase of one field and [applies] a remedy there, neglecting the others' . . . [s]o long as its judgments are rational, and not invidious, the legislature's efforts to tackle the problems . . . are not subject to a constitutional straitjacket." *Jefferson v. Hackney*, 406 U.S. 535, 546 (1972); *see also Clements v. Fashing*, 102 S. Ct. 2836 (1982).

The Court below, while conceding that the unavailability of the benefits of § 501(c)(3) status to appellee does not impose a direct burden on appellee's First Amendment rights but only "involves unequal levels of governmental subsidy of First Amendment rights," App. 39a, nevertheless held that a strict level of scrutiny should be

applied and that the distinctions drawn by § 501(c)(3) could be sustained only if they served a "substantial governmental interest [and were] . . . narrowly tailored to serve that end." *Id.* at 45a. That conclusion is erroneous. This Court has on several occasions in recent years addressed this question and, in each case, ruled that differing levels of governmental subsidy or benefits relating to the exercise of fundamental rights need not be subject to strict scrutiny under the Equal Protection Clause.

For example, in *Maher v. Roe*, 432 U.S. 464 (1977), the Court had to determine whether withholding public health benefits from women who chose to exercise the fundamental right to a first trimester abortion, while providing benefits for expenses incident to childbirth, constituted an invidious burden on that right warranting close judicial scrutiny. The Court concluded that it was "abundantly clear that . . . [the government] is not required to show a compelling interest for its policy choice to favor . . . [one permissible activity] any more than . . . [it] must so justify its election to fund public but not private education." *Id.* at 478. *Accord*, *Harris v. McRae*, 448 U.S. 297, 318, 322-26 (1980) (decision whether to subsidize the exercise of a fundamental constitutional right is one for Congress and "not a matter of constitutional entitlement"). As this Court held in considering an equal protection challenge to denial of public financing to some presidential candidates but not others, since the discrimination involved there was limited to "denial of the enhancement of opportunity to communicate with the electorate that the [statute] afford[s] eligible candidates," *Buckley v. Valeo*, 424 U.S. 1, 94-95 (1976), it was not required to meet the "compelling interest" scrutiny applied to ballot access restrictions.

A fortiori, in this case, where the discrimination complained of is not the government's failure to provide a direct subsidy to one type of organization that is provided to another, but rather its failure to provide an in-

direct incentive to private giving by offering tax benefits to prospective donors, the standard of strict scrutiny must be rejected. A very wide range of government programs provide subsidies, benefits, or incentives, direct or indirect, that may enhance the opportunities of one group as opposed to another in the exercise of important constitutional rights, including First Amendment rights. If each of these governmental classifications must be justified by a compelling state interest narrowly implemented, despite the absence of any direct restriction on constitutional rights, the courts would be faced with the detailed review of a staggering array of legislation. Nowhere is this better illustrated than in the instant case; the tax code's treatment of exempt organizations alone reflects a complex pattern of legislative judgments relating to a number of historical governmental concerns arising from problems encountered in extending tax benefits to such organizations. If rigorous scrutiny is applicable to every difference in indirect tax benefits or incentives impacting important constitutional rights, the tax code will hardly be able to escape a most thorough judicial rewriting.

B. Even Under A Rigorous Standard Of Review, The Tax Code Classifications Between Veterans Groups And § 501(c)(3) Organizations Pass Muster.

Even if the Court of Appeals was correct in applying some degree of heightened scrutiny, the difference in treatment involved here is justified because (1) the lobbying restriction on § 501(c)(3) organizations reflects a strong government policy to guard against the abusive use of deductible contributions for lobbying purposes, and (2) Congress legislated in a reasonably narrow and tailored manner, since the dangers Congress perceived in § 501(c)(3) organizations' lobbying are not posed to the same degree by veterans' organizations.

The permissible purposes for which a § 501(c)(3) organization may be established are broad indeed; the

number of such groups is large; and the reporting and disclosure requirements imposed on most such organizations are minimal. As disussed above, Congress concluded that, in order to prevent such groups from functioning as mere conduits for the use of tax-deductible funds for lobbying to "advance the personal interests" of a few wealthy givers, some restrictions were necessary. Both this Court and the lower federal courts have recognized Congress' "sharply defined national policy" to guard against the use of substantial tax-deductible funds for lobbying activities. *Cammarano v. United States*, 358 U.S. 498, 508 (1959); *accord Haswell v. United States*, 500 F.2d 1133, 1150 (Ct. Cl. 1974), *cert. denied*, 419 U.S. 1107 (1975) ("[C]ongressional interest in prevention of the use of tax funds to support lobbying is compelling.")

The history of Congress' recent decision to mitigate the lobbying restrictions on § 501(c)(3) organizations demonstrates its particularized concerns about the dangers such organizations might pose to this important governmental policy absent any such restrictions. Congress was concerned, specifically, that due to their potentially flexible membership and loose internal regulations,[7] and the lack of functional reporting requirements imposed upon them,[8] these organizations were likely to become

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[7] *See* Hearings 1972, *supra* note 6, at 9 (remarks of Edwin Cohen, Ass't Sec'y for Tax Policy, Dept. of the Treasury; difficulty of defining membership of Section 501(c)(3)s); *id.* at 78-79 (remarks of Rep. Waggoner; looseness of membership criteria and lax internal review procedures of 501(c)(3)s).

[8] *See* Hearings 1972, *supra* note 6, at 9 (remarks of Edwin Cohen, Treasury official; noting laxity of disclosure requirements on lobbying by § 501(c)(3)s); *Influencing Legislation by Public Charities, Hearing Before the Comm. on Ways and Means, House of Representatives*, 94th Cong., 2d Sess. (1976) (hereinafter "Hearings 1976") at 15 (remarks of Rep. Schneebeli and William M. Goldstein, Dep. Ass't Sec'y of the Treasury; need for disclosure requirements for § 501(c)(3)'s); *id.* at 46 (remarks of Elvis Stahr; § 501(h) valuable because it would improve "monitoring the legislative efforts of public charities").

conduits for the advancement of the interests of wealthy contributors [9] and to front lobbyists whose statements "really represen[t] their own views rather than the people they profess to represent." [10]

That Congress did not perceive similar dangers in the operation of veterans' organizations is hardly surprising. Veterans' organizations are relatively fewer in number and, for the most part, were formed for specific and limited purposes, with well-defined membership and relatively tight internal controls on lobbying activities. Their membership and strength is not only likely to remain substantial irrespective of deductibility, but that membership

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[9] Thus, the ABA Section on Taxation stated in its recommendation to Congress that:

> Since the charitable deduction means more to the rich than the poor and the former have more money anyway to give away to charity, the rich tend to play a larger role than the poor in influencing the policies of charitable organizations (especially private foundations): thus, permitting deductible charitable contributions to be used for lobbying purposes may extend the legislative influence of the rich as opposed to the poor. Finally, particular taxpayers may not want the tax exempt funds of a charity to be used to support particular legislation of which they disapprove.

Hearings 1972, *supra*, note 6, at 171; (*reprinted in* Hearings 1976, *supra* n.6, at 68); Hearings 1976 at 18 (Rep. Duncan: fear that § 501(h) "written for a few special groups").

[10] Hearings 1973, *supra* note 6, at 1496; *see also* Hearings 1972, *supra* n.6, at 80-81 (remarks of Rep. Waggoner):

> What I am afraid of is that as a representative of the national assembly, if you are granted the privilege of spending any amount of money that you people have available to you for disbursement for political purposes to influence Government, that . . . you are . . . going to be speaking for yourself and voicing your personal opinions without much regard for the people back home that you supposedly represent. There are too many organizations in this country today who do just exactly that.

Id. at 82 (involvement in "democratic process" through lobbying necessitates "democratic" representation of membership by § 501(c)(3)'s); *id.* at 227.

transcends partisan political, ethnic, religious or occupational lines.[11] The major veterans' organizations, which are federally chartered, are subject to special reporting requirements concerning their proceedings and finances. Thus, Congress had substantial grounds to conclude that the need for lobbying restrictions on veterans' organizations had not been demonstrated.

The nature and activities of the American Legion, the largest of all veterans' organizations in membership and budget, amply bear out this congressional judgment.[12] The Legion was formed by returning World War I veterans for specific purposes relating to promoting the rights and interests of veterans, particularly disabled veterans or others disadvantaged by their military service, and widows and orphans of those who had died in World War I. Virtually at its inception, the Legion was chartered by Congress. The Charter, 36 U.S.C. §§ 41-51, specifically enumerates the Legion's organizational powers and purposes, has been amended a number of times by Congress, and provides that it can be revised by Congress at any time. *See* 36 U.S.C. § 51. Thus, by contrast to most § 501(c)(3) organizations, the Legion (and all other major veterans' organizations) have purposes that are not only historically determined, but also specified and limited by Congress, and subject to its direct review.

Moreover, Congress and the public are in a particularly good position to scrutinize the sources of the Legion's

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[11] *Proposals for Administrative Changes In Internal Revenue Service Procedures, Hearings Before the House Ways and Means Oversight Comm.*, 94th Cong., 1st Sess. (1975) [hereinafter "Hearings 1975"] at 133-34 (ABA report on effects of § 501(c)(3) status determination; veterans' groups distinguished from § 501(c)(3)'s in that "contributions to [the former] type of organization are typically made by a membership group which is likely to continue to support the organization even if a question is raised as to its [deductible] status.")

[12] If this case were remanded to explore these areas, amicus would, if permitted, make a proffer of proof in the District Court to establish these and the other facts set forth herein.

funds and the uses to which they are put since, by law, the Legion must have an annual audit conducted by an independent accounting firm for presentation to Congress, and must also file with Congress a complete report of its proceedings for the preceding year. 36 U.S.C. §§ 49, 1101-03. The annual reports of the Legion's conventions, including reports of all divisions and departments, are published as official congressional documents.[13] And, of course, Congress is in a position to be knowledgeable concerning veterans' lobbying since it is primarily before Congress that such groups lobby. Thus, Congress is apprised on an annual basis of the detailed information necessary to determine the extent, if any, to which tax-deductible funds are in fact being used by the Legion for lobbying, and is able to take remedial action if abuse occurs.

In fact, contrary to the Court of Appeals' suggestion based on a ten-year-old law review article, App. 23a,[14] the Legion does not pose the problems of an organization aggressively using tax deductible money for lobbying. The Legion receives a negligible proportion of its budget from deductible contributions, and spends a relatively

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[13] *See, e.g.*, H.R. Doc. No. 131, Proceedings of 63d National Convention of the American Legion, 97th Cong., 2d Sess. (1981).

[14] The majority opinion contains other inaccuracies concerning the American Legion (not surprisingly, in view of the parties' failure to present evidence on the activities of veterans' groups). For example, the majority implies that the Legion's congressional appearances in hearings on postal services are outside the scope of its proper purposes. App. 23a-24a. But because of the Legion's publication of a monthly magazine with an estimated readership of 7 million, it has a direct interest in postal costs and services for mailings by nonprofit organizations.

In addition to a relatively small amount of lobbying, focussed primarily though not exclusively on veterans benefits and Veterans Administration issues, the Legion is involved in a wide range of public service activities consistent with its charter such as Boys State and Boys Nation, providing scholarships to high school students, providing assistance in administrative proceedings affecting veterans, and on-site inspection of the V.A.'s 172 hospitals.

small portion of its total budget on lobbying efforts. The Legion's principal source of funds is the payment of modest annual dues by each of its 2,400,00 members. Other substantial sources of income include investment income, and income derived from its group term life insurance plan, the American Legion Life Insurance Plan. The Legion has a policy of not permitting the solicitation *or acceptance* of charitable contributions without the specific consent of its Executive Committee. Ordinarily, the Legion does not solicit contributions at the national level for its *own* purposes. It has, however, on a number of occasions conducted solicitations for tax-deductible contributions *to be given to others* for public or quasi-public purposes.[15]

Similarly, only a small percentage of the Legion's funds —less than the percentage ceiling imposed on a § 501(c)(3) organization under § 501(h)—are used for lobbying activities. In fact, of the Legion's 1982 budget approximating $23 million, only $314,284 is allocable to the legislative division. Of this, the major portion is allocated to employee salaries and benefits—a relevant fact because the most substantial part of the activities of this division involve responding to specific requests from congressional committees for testimony by Legion representatives. Thus, in the 97th Congress, the American Legion's National Legislative Commission presented testimony or written statements to be included in committee records on 85 occasions. Of these 85 official statements, 83 were presented in response to congressional committees' letters of request. *Cf.* 26 U.S.C. § 501(h)(2)(A); 26 U.S.C. § 4911(d)(2)(B) ("lobbying expenditures" counted toward

[15] For example, the Legion raised $1.2 million in deductible contributions from its membership for the Vietnam Veterans' Memorial on the mall; $500,000 for the Bicentennial, which it gave the government for production of a replica of the Freedom Bell; and in the past raised over $1 million for the Cancer Foundation. In addition, the Legion receives bequests, often designated for specific purposes (such as "children and youth"), which are required to be reported individually to its Executive Committee.

§ 501(h) limits do not include providing technical assistance in response to a request from a governmental body).

Congress' concern that organizational lobbyists would not in fact represent the views of large, loosely organized memberships in the § 501(c)(3) context, is similarly inapplicable to veterans' organizations. The American Legion will neither testify nor otherwise engage in lobbying activities unless its membership has, at an annual convention, formally adopted a specific resolution on the subject matter in question and thus authorized legislative action by the Legion. This requirement is rigorously adhered to in order to assure that it is the views and interests of the Legion's members, and not simply those of a few leaders or contributors, that are communicated to the Congress.[16]

Finally, Congress was undoubtedly aware of the quantitative difference between the potential large-scale use of deductible contributions for lobbying by § 501(c)(3) organizations, and any corresponding danger in the case of veterans' organizations. As even the Court of Appeals recognized, according to the best available figures there are approximately *fifteen* times as many § 501(c)(3) organizations as veterans' organizations and, more important, in 1978, contributions, gifts and grants to all § 501(c)(3) organizations totalled about $22 billion, nearly 1500 times the $16.7 million given to veterans' organizations in that year. App. 73a. This substantial disparity, when viewed in combination with the unique char-

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[16] Membership approval is a very significant check on improper lobbying efforts because veterans are a large and substantial group, cutting across racial, political and geographic lines, and lines of wealth. The American Legion, moreover, under its charter and constitution, and by uniform practice, has absolutely no involvement, direct or indirect, in electoral politics. *See* Constitution and By-Laws of the American Legion, art. II, § 2 ("The American Legion shall be absolutely nonpolitical and shall not be used for the dissemination of partisan principles nor for the promotion of the candidacy of any person seeking public office or preferment.").

acteristics of veterans' organizations, as a practical matter precludes their posing a significant threat to the governmental interests involved in the lobbying restrictions on § 501(c)(3) organizations, and demonstrates convincingly why Congress saw no need to extend such restrictions to veterans' groups.

Since a substantial basis exists for the tax code's distinctions between these exempt organizations, the Court of Appeals' finding of an equal protection violation was erroneous.

II. THE REMAND ORDERED BY THE COURT OF APPEALS EXCEEDS THE SCOPE OF THE DISTRICT COURT'S JURISDICTION PURSUANT TO 26 U.S.C. § 7428 AND RAISES CONSTITUTIONAL PROBLEMS.

This action was filed pursuant to § 7428 of the Internal Revenue Code, 26 U.S.C. § 7428. This special jurisdictional statute was enacted in 1976 to carve out a very narrow exception to the general rule, embodied in both the Anti-Injunction Act, 26 U.S.C. § 7421(a), and the Declaratory Judgment Act, 28 U.S.C. § 2201, that taxpayers can only challenge the Service's treatment of them in a suit for refund in the district court or Court of Claims, or in the Tax Court, after the IRS has assessed a deficiency. The Court of Appeals' remand order here appears inconsistent with the jurisdictional predicate for this action and the limitations which Congress carefully imposed on the federal courts' exercise of jurisdiction pursuant thereto, and thus raises an important issue for this Court's review.

Section 7428 is an unusual example of congressional qualification of federal court jurisdiction. A complaint under the section may be filed "only by the organization the qualification or classification of which is at issue," and must relate to a "determination" by the IRS relating to that organization's "initial . . . or continuing qualification" under § 501(c)(3), 26 U.S.C. § 7428(b)(1). Most im-

portant for these purposes, Congress set forth with great precision the nature of the remedy it was authorizing. Subsection (a) of § 7428 is headed "Creation of Remedy" and states: "[U]pon the filing of an appropriate pleading, . . . the district court of the United States for the District of Columbia may make a declaration with respect to such initial qualification or continuing qualification. . . ." The plain language of this statute, which must provide at least the starting point for analysis, *e.g.*, *Touche Ross & Co. v. Redington*, 442 U.S. 560, 569 (1979); *Ford Motor Credit Co. v. Cenance*, 452 U.S. 155, 158 n.3 (1981), thus indicates that Congress contemplated that, if a plaintiff prevailed in its challenge to the Internal Revenue Service's action in denying an exemption application, the court would simply issue a declaratory judgment that the Service had acted improperly.

This conclusion is reinforced by the emphatic limitation of petitioners under § 7428 to organizations whose "qualification or classification" is at issue. *See Cheng Fan Kwok v. INS*, 392 U.S. 206, 213 (1968) (jurisdictional statute "must be construed both with precision and with fidelity to the terms by which Congress has expressed its wishes"). Had Congress wished to permit § 7428 litigation to provide a vehicle for taxpayer challenges to the IRS' treatment of other taxpayers, this limitation would not have been included. See S. Rep. 938, 94th Cong., 2d Sess., 588, 587 n.6. The structure of the statute, then, as well as its plain language, demonstrates that the relief contemplated by the Court of Appeals is entirely inconsistent with that provided for by Congress.

The legislative history likewise supports the conclusion that the remedial jurisdiction of the district court under § 7428 is very limited. Congress sought to address a particular problem in this legislation—to wit, the inability of nonprofit organizations claiming to be entitled to § 501(c)(3) status to survive without the economic benefit of deductible contributions in the event that the Service denied or revoked such status. Under the general limitations ap-

plicable to taxpayer litigation with the Service, such an organization's only remedy was lengthy refund litigation in the Court of Claims or district court, or a deficiency protest in the Tax Court. Such litigation left the organization's status as a recipient of deductible contributions in jeopardy, for contributions might simply dry up or the organization might never raise enough income to incur a tax liability permitting it to litigate the question. *See Alexander v. "Americans United" Inc.*, 416 U.S. 752 (1974); *Bob Jones University v. Simon*, 416 U.S. 725 (1974). This Court, while indicating its sympathy for the plight of § 501(c)(3) organizations in such circumstances, rejected arguments that it could carve out a judicially created exception to the established mechanisms for litigating such challenges, recognizing that *only* Congress could make the necessary policy choices inherent in establishing such a remedy. 416 U.S. at 750.

The expedited review procedure thereafter made available by Congress to § 501(c)(3) organizations in § 7428 to obtain a declaratory judgment as to their tax status constituted a congressional recognition of the unique problems faced by such organizations. But Congress sought to limit the potential disruptiveness of such suits to the orderly administration of the tax code by specifically rejecting proposals to permit district courts to issue injunctive relief, and adopting the ABA's recommendation that *only* § 501(c)(3), and *not* other § 501(c) organizations, be permitted to take advantage of this expedited procedure. *See* Tax Section Recommendation No. 1974-17, reprinted in Hearings 1975, *supra* n.11, at 133-34; Hearings 1975, *supra* n.11, at 126 (testimony of Alan Morrison). The intent of the law was simply to permit such organizations to obtain judicial review of their entitlement to exempt status in advance of incurring tax liability. So, with regard to remedies, the successful taxpayer in a § 7428 case—instead of obtaining a refund, or removing

a deficiency notice—would obtain a declaratory judgment that it was entitled to exempt status.

Until now, the federal courts have recognized congressional intent that § 7428 not interfere with the administration of the tax code by any radical expansion of the procedures and remedies normally available to litigants against the Service,[17] and have also been rigorous in adhering to the substantive limitations on the subject matter of litigation that may be brought under § 7428.[18] Indeed, the same Court of Appeals that decided the instant case has, in another case, implicitly recognized that the limited scope of § 7428 also limits the permissible remedies. *Basic Unit Ministry of Schurig v. Commissioner*, 670 F.2d 1210 (D.C. Cir. 1982) (explaining denial of unusual relief in case under § 7428).

The relief contemplated by the Court of Appeals here is far afield from that which Congress and the courts have understood was intended under § 7428. Instead of making a determination as to whether the Service's denial of TWRW's application was correct, or should be set aside because the provision upon which it was based was unconstitutional, the Court below directed the District Court to consider issuing limitations on other taxpayers, contemplating a wholesale revision of the Service's administration of §§ 501(c)(4), 501(c)(19), 170, 2055 and 2522 insofar as they apply to veterans' organizations. This is

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[17] *See, e.g., Southwestern Virginia Professional Standards Review Org., Inc. v. United States*, 78-2 U.S.T.C. ¶ 9747 (D.D.C. 1978) (adopting Tax Court Rules limiting scope of *de novo* review to administrative record except in extraordinary circumstances); *Virginia Professional Standards Review Found. v. Blumenthal*, 466 F. Supp. 1164 (D.D.C. 1979) (conforming to Tax Court rules regarding scope of review).

[18] *See, e.g., CREATE, Inc. v. Commissioner*, 634 F.2d 803 (5th Cir. 1981) (no jurisdiction under § 7428 to review adverse determination concerning applicability of percentage limitation to certain contributions to taxpayer); *Urantia Foundation v. Commissioner*, 684 F.2d 521 (7th Cir. 1982) (no jurisdiction under § 7428 to address public support computation of nonprivate foundation).

a tremendous distortion of the nature of the remedial process Congress contemplated in this statute.[19] *Cf.* S. Rep. No. 938, 94th Cong., 2d Sess., 588 (judgments under § 7428 "to be binding upon the parties to the case").

As this Court has recognized in other contexts, when Congress has specifically addressed the question of what remedies are available to vindicate particular statutory rights the Courts should be more than usually hesitant to infer the implied existence of additional or alternative remedies. *See, e.g., Calhoon v. Harvey*, 379 U.S. 134, 139-41 (1964); *National Railroad Passenger Corp. v. National Association of Railroad Passengers*, 414 U.S. 453 (1974); *Securities Investor Protection Corp. v. Barbour*, 421 U.S. 412 (1975); *cf. Chrysler Corp. v. Brown*, 441 U.S. 281, 293 (1979). *See also Cannon v. University of Chicago*, 441 U.S. 677, 731-50 (1979) (Powell. J., dissenting). *A fortiori* is this so when Congress has created a manifestly limited exception to longstanding statutes *precluding* the exercise of jurisdiction, and has used very specific language to define the nature of the declaratory relief that may be granted.[20]

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[19] The type of remedial order contemplated by Congress, in the event of a successful constitutional challenge to the denial of an exemption, is illustrated in *National Alliance v. United States*, 81-1 U.S.T.C. ¶ 9464 (D.D.C. 1981) (where regulation's definition of "educational" void for vagueness, IRS determination that plaintiff not entitled to tax exemption was vacated); *see also Big Mama Rag, Inc. v. United States*, 631 F.2d 1030 (D.C. Cir. 1980).

[20] The statutory language of § 7428, limiting relief to a "declaration with respect to [the] initial qualification" of the petitioning taxpayer, may be contrasted with other remedial statutes considered by this Court. Thus, in *Hecht Co. v. Bowles*, 321 U.S. 321 (1944), the Court held that federal courts were not required to issue injunctions by a provision that, upon a showing by the Administrator of emergency price control violations, "a permanent or temporary injunction, restraining order or other orders shall be granted . . . ." The reference to "other orders," the Court said, made clear that there was room for discretion in the issuance of a remedy. 321 U.S. at 329. *Cf. Porter v. Warner Holding Co.*, 328 U.S. 395 (1946). Here, of course, there is no "other orders" or com-

The remand order, moreover, poses problems going beyond the question of statutory interpretation. As the government noted in its Jurisdictional Statement, the Court of Appeals seems to contemplate that the district court should engage in precisely the kind of legislative hearing and policy determination reserved to Congress. Juris. St. at 11. The remand order does not pose a simple question of whether an equal protection violation arising from an underinclusive statute should be remedied either by extension or by invalidating the entire scheme. The tax code is of sufficient complexity, and the court's decision has thrown into question the constitutionality of so many of its provisions acting in concert, that the case cannot easily be analogized to a more straightforward economic benefit equal protection case.

The remand order here contemplates a major and unprecedented restructuring of the Internal Revenue Code's treatment of exempt organizations. As this Court emphasized in *Califano v. Westcott*, 443 U.S. 76, 93 (1979), a proposed remedy which "would involve a restructuring of the Act" should not be undertaken lightly. *See also Welsh v. United States*, 398 U.S. 333, 366-67 n.18 (1970) (Harlan, J., concurring). Recognizing that, in remedying equal protection violations a court "risks infringing legislative prerogatives," the Court in *Westcott* rejected the effort by the Massachusetts Commissioner of Welfare to obtain a remedial order that would have involved such a restructuring of the AFDC-UF program.[21] The Court spe-

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parable language inviting the courts to stray from the limited form of relief provided for by Congress. *See also Califano v. Yamasaki*, 442 U.S. 682, 705-07 (1979); *Scripps-Howard Radio v. FCC*, 316 U.S. 4, 11 (1942).

[21] The Court there found that a provision authorizing AFDC benefits where the father was unemployed, but not having a similar provision where the mother was unemployed, could not be sustained. The District Court's order, extending the operation of the statute to include unemployed mothers as well as unemployed fathers, was upheld by the Court, which rejected a suggestion by the Massa-

cifically noted that the Commissioner's proposed restructuring "would pose definitional and policy questions best suited to legislative or administrative elaboration." 443 U.S. at 93.

As shown above in Part I, Congress made a deliberate decision to impose lobbying restrictions only on § 501(c)(3) organizations. As the hearings in the 1970's on § 501(h) made clear, Congress was aware that it was legislating in an area affecting protected First Amendment freedoms. *See, e.g.*, Hearings 1976, *supra* note 6, at 61. Particularly where such rights are at issue, a court should be loath to override such a legislative judgment, where the effect of its ruling would be to extend restrictions on otherwise protected activities rather than to remove them. *See United States v. Robel*, 389 U.S. 258, 277-78 (1967) (Brennan, J., conc'g) (need for legislative judgment imperative where exercise of fundamental freedoms involved).

This caution is reinforced by the very cases cited by the Court of Appeals in support of its remand order—none of which support its assertion that "the Supreme Court has recognized [that] in certain situations benefits may be taken away from a preferred group in order to cure unconstitutionally unequal treatment even if that group is not before the court." App. 75a. In *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535 (1942), having found a denial of equal protection, the Court struck down the sterilization statute there at issue; it specifically declined to determine whether its unconstitutionality could be cured by extending the category of crimes punishable by sterilization. *Id.* at 543. Similarly, in *Welsh v. United*

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chusetts Commissioner of Welfare that the District Court's order should be modified to provide for payments only where the principal breadwinner (defined without regard to sex) became unemployed. The Court, while noting that such a provision might be more consistent with the legislative purpose, rejected it on the ground that it would have involved a restructuring of the statute prohibited to the judiciary. *Westcott*, 443 U.S. at 92-95.

States, 398 U.S. 333 (1970), the Court reversed the conviction of a conscientious objector whose scruples were not related to belief in a Supreme Being on the ground that the statute, by requiring such a religious belief, was unconstitutionally underinclusive. Justice Black's opinion for the Court nowhere suggests that an appropriate remedy might be to strike down the entire conscientious objector program. Justice Harlan, in a concurring opinion, alluded to the theoretical possibility that an underinclusive statute could be cured by invalidating altogether the benefit it provided, but concluded that the Court there did not have any choice because conscientious objector status for religious objectors was of long standing and represented a congressional policy that would be undermined by striking that benefit. *Id.* at 361, 366-67.[22]

A review of these and other equal protection cases suggests that no support exists for the Court of Appeals' proposition. To the contrary, where statutes imposing restrictions on a particular group have been invalidated on grounds of under-inclusiveness, this Court has followed the practice of striking down restrictions rather than seeking to extend them to a larger group. *See, e.g., Skinner v. Oklahoma, supra*, 360 U.S. at 543; *Williams v. Rhodes*, 393 U.S. 23 (1968). Similarly, statutes providing governmental benefits found to discriminate by virtue of under-inclusiveness, have consistently been extended to cover those complaining that they were unfairly excluded.

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[22] *Iowa-Des Moines National Bank v. Bennett*, 284 U.S. 239 (1931), involved no unconstitutional statute, but an attack by two national banks on the discriminatory *administration* of a state tax provision which resulted in lower taxes on the banks' competitors. The Court, finding that the discrimination contravened a federal statute, ordered that the banks receive a tax refund. The sentence relied on by the Court of Appeals from the opinion in that case, App. 75a, when read in context, does not refer to any issue of remedy at all, but simply states that petitioners there would have had no claim of discriminatory treatment in the first place if the tax burdens had been equalized, either by increase of their competitors' taxes or decrease of their own.

See, e.g., Califano v. Westcott, supra, 443 U.S. at 90-91, and cases cited therein.

A number of underlying bases for this consistent practice can be identified. For a court to deprive a class of persons of a benefit Congress has sought to confer, particularly where those adversely affected are not parties to the litigation, plainly implicates due process considerations not present where the same benefits are extended to others. As this Court has repeatedly made clear, the peculiar authority of courts arises from their jurisdiction over the particular parties whose rights and interests are being adjudicated. *See Hansberry v. Lee,* 311 U.S. 32, 40-41 (1940). The instant proceeding itself well illustrates the dangers of erroneous fact-finding and inadequate argument that arise from adjudication of the rights of nonparties or of seeking to bind such absent parties when they have not been able to participate in the underlying proceeding. *See* p. 16 & n.14, *supra. See also* Fed. R. Civ. Proc. 19 (indispensable parties).[23]

Moreover, the courts have recognized the paramount need, in remedying equal protection violations, to do as little "rewriting" of legislation as possible. *Cf. Aptheker v. Secretary of State,* 378 U.S. 500, 515 (1964). Extending the § 501(c)(3) lobbying restrictions to other organizations would require the Court to "make a new law, not to enforce an old one," a task which is "no part of [the Court's] duty," *United States v. Reese,* 92 U.S. 214,

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[23] In addition, for the courts to begin *extending* restrictive legislation complained of by members of the restricted class would undercut the predicate for standing—the existence of an injury redressable by the relief sought. *See Simon v. Eastern Ky. Welfare Rights Org.,* 426 U.S. 26 (1976). TWRW did not in this case complain that other organizations were allowed to lobby; it complained that it was not. To sustain the remedial order contemplated by the Court of Appeals would entirely divorce the constitutional prerequisite of standing to sue from any limits on the courts' remedial jurisdiction and thus pose further dangers of the courts invading the legislative prerogative.

221 (1875). Striking down the restriction applicable to § 501(c)(3) would not call for such affirmative judicial legislating. The government's policy of according exempt and deductible-eligible status to charitable organizations, including veterans' groups, is beyond question. *Cf. Welsh v. United States*, *supra*, 398 U.S. at 367 n.18 (Harlan, J., conc'g) (important to not frustrate third-party beneficiary legislation). So, too, is Congress' clear intention to treat veterans' organizations differently in some respects from other exempt organizations, and finally, to limit the amounts that § 501(c)(3) charitable organizations may use for lobbying purposes. Yet the remedies proposed by the Court of Appeals would inevitably interfere with most of these congressional policies.

As has been observed in a different context, "[f]ormulation of policy is a legislature's primary responsibility, entrusted to it by the electorate [and the Constitution] . . . Congress has the resources and the power to inform itself, and is the appropriate forum where the conflicting pros and cons should [be] presented and considered." *United States v. Robel*, *supra*, 389 U.S. at 276 (Brennan, J., conc'g). *See also Califano v. Westcott*, *supra*, 443 U.S. at 95-97 (Powell, J., conc'g and diss'g in part). There was substantial sentiment in the 94th Congress for elimination of lobbying restrictions on § 501(c)(3) organizations altogether. *See, e.g.*, Hearings 1976, *supra* n.6, at 57. At the same time, Congress has consistently acted to recognize the special role of veterans' organizations, not only in the tax code but in other federal statutes, *e.g.*, 38 U.S.C. § 3402(a). Under these circumstances, and particularly in the absence of empirical data concerning the likely effect of eliminating lobbying restrictions on the legislative activities of § 501(c)(3) organizations, it would surely be hazardous for a court to seek to predict what choices Congress would make if remedial legislation were necessary. *Comp. Northern Pipeline Construction Co. v. Marathon Pipeline Co.*, 102 S. Ct. 2858, 2880 n.40 (1982) (Court stayed mandate in case finding

bankruptcy courts unconstitutional to permit Congress to remedy problem).

Given the complexity of the tax code, moreover, and the interaction of its numerous provisions to produce the alleged unconstitutional discrimination here, the remand order of the Court of Appeals virtually requires the District Court, in violation of the basic constitutional principle of separation of powers, to engage in legislative functions. For the District Court would not only have to resolve whether to impose lobbying restrictions on veterans' organizations, but would have to resolve difficult issues of how best to accomplish this, since no single provision in the tax code can simply be struck so as to achieve this result. Would, for example, the district court impose a "no substantial lobbying" requirement, modeled on that found in § 501(c)(3), on veterans' organizations seeking to qualify as exempt organizations under §§ 501(c)(4) or (c)(19)? Would it instead insert such a requirement in the deductibility provisions, such as § 170? Would it make available a § 501(h) option for veterans' organizations, and if so, would that be a condition of exempt status or of deductibility? It is difficult to imagine a set of choices more redolent of policy concerns committed under the Constitution to the Congress. And on these issues, as well, it would be difficult in advance of legislative hearings to predict Congress' choices. See *Marchetti v. United States*, 390 U.S. 39 (1968).

What does seem clear, however, is that in this case, unlike those described above, there is a substantial reason to believe that Congress did *not* intend to permit the courts unfettered discretion to engage in wideranging, remedial restructuring of the tax code. Whatever may be the Court's constitutional remedial powers in general federal question litigation, here Congress has spoken on the nature of the remedy it provided under § 7428. Since the ultimate objective in crafting a remedy would be to effectuate Congress' will, and since here, Congress was quite explicit in describing in the jurisdictional statute

what remedial orders could be issued, this Court need not reach the constitutional question to hold that the "most logical" remedy contemplated by the Court of Appeals is not a permissible remedy under the statute.

CONCLUSION

For all these reasons, the judgment of the Court of Appeals should be reversed.

Respectfully submitted,

* MITCHELL ROGOVIN
GEORGE T. FRAMPTON, JR.
VICKI C. JACKSON

ROGOVIN, HUGE & LENZNER
A Professional Corporation
1730 Rhode Island Avenue, N.W.
Suite 1100
Washington, D.C. 20036
(202) 466-6464

* *Counsel of Record for The American Legion*

Of Counsel

BERTRAM G. DAVIS, ESQUIRE
700 North Pennsylvania Street
Indianapolis, Indiana 46206

SAMUEL C. BORZILLERI, ESQUIRE
888 17th Street, N.W.
Washington, D.C. 20006

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No. 81-2253

In The
Supreme Court of the United States
October Term, 1982

Donald T. Regan, Secretary of the Treasury, *et al.*,
Appellants,
v.
Taxation With Representation of Washington,
Appellee.

On Appeal from the United States Court of Appeals
for the District of Columbia Circuit

BRIEF *AMICI CURIAE* OF DISABLED AMERICAN VETERANS AND PARALYZED VETERANS OF AMERICA IN SUPPORT OF THE UNITED STATES

Joseph C. Zengerle *
Zachary R. Karol
Byron R. Trauger
Katherine H. Wheatley
Bingham, Dana & Gould
1724 Massachusetts Ave., N.W.
Washington, D.C. 20036
(202) 822-0220
Counsel for Disabled American Veterans and Paralyzed Veterans of America
*Counsel of Record

Wilkes - Byer Printing Co., Inc. - 783-0000 - Washington, D.C. 20001

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iii
INTERESTS OF *AMICI CURIAE*	1
SUMMARY OF ARGUMENT	3
ARGUMENT	5
THE INTERNAL REVENUE CODE'S DIFFERENT TREATMENT OF THE LOBBYING ACTIVITIES OF VETERANS' AND CHARITABLE ORGANIZATIONS DOES NOT VIOLATE THE EQUAL PROTECTION PRINCIPLE EMBODIED IN THE FIFTH AMENDMENT	5
I. The Court of Appeals Applied an Erroneous Standard of Review Because it Did Not Consider the Interests Congress Has as a Coordinate Branch of Government in the Tax Differential at Issue, and Because it Gave Undue Weight to the Effect of the Differential on Appellee's First Amendment Rights	6
A. The principle of separation of powers requires this Court to review the tax differential with great deference, because the classification assists a coordinate branch of government to perform its constitutional functions	6
B. The tax differential does not sufficiently affect the exercise of appellee's fundamental rights under the First Amendment to justify abandonment of traditional deference to legislative classifications	11
II. Substantial Governmental Interests Support the Different Tax Treatment of Lobbying by Veterans' and Charitable Organizations	13

TABLE OF CONTENTS—Continued

Page

A. The reason for restricting the lobbying activities of charitable organizations does not apply with equal force to veterans' organizations 14

B. The substantial governmental interest of assisting Congress to perform its constitutional functions is served by confining the lobbying restriction to charities, thereby preserving unimpeded the flow to Congress of information uniquely possessed by veterans' organizations and important to effective Congressional actions concerning veterans' affairs 21

CONCLUSION 30

TABLE OF AUTHORITIES

CASES: Page

Buckley v. Valeo, 424 U.S. 1 (1976) 12, 13
Califano v. Goldfarb, 430 U.S. 199 (1977) 21n, 22n
Califano v. Jobst, 434 U.S. 47 (1977) 12
Cammarano v. United States, 358 U.S. 498 (1959).. 12
Dandridge v. Williams, 397 U.S. 471 (1970) 22n
Duke Power Co. v. Carolina Envtl. Study Group, 438 U.S. 59 (1978) 30n
Fullilove v. Klutznick, 448 U.S. 448 (1980) 4, 7, 10
Hutchinson v. Proxmire, 443 U.S. 111 (1979)..... 8
Johnson v. Robison, 415 U.S. 361 (1974) 10n, 12, 22n
Johnson v. United States, 422 F. Supp. 958 (N.D. Ind. 1976), *aff'd sub nom. Barter v. United States*, 550 F.2d 1239 (7th Cir. 1977), *cert. denied*, 434 U.S. 1012 (1978) 13
Madden v. Kentucky, 309 U.S. 83 (1940) 11
Massachusetts Board of Retirement v. Murgia, 427 U.S. 307 (1976) 29n
McCarty v. McCarty, 453 U.S. 210 (1981) 10n
McGrain v. Daugherty, 273 U.S. 135 23
Personnel Adm'r v. Feeney, 442 U.S. 256 (1979).. 23
Regan v. Taxation with Representation of Washington, 50 U.S.L.W. 3998 (U.S. June 22, 1982).. 3n
Robinson v. Lorillard Corp., 444 F.2d 791 (4th Cir.), *cert. dismissed*, 404 U.S. 1006 (1971)..... 30n
San Antonio School Dist. v. Rodriguez, 411 U.S. 1 (1973) 11
Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208 (1974)..... 30n
Schweiker v. Wilson, 450 U.S. 221 (1981) 30n
Taxation with Representation of Washington, Inc. v. Regan, 676 F.2d 715 (D.C. Cir. 1982) .....*passim*
United States Department of Agriculture v. Moreno, 413 U.S. 528 (1973) 11
United States v. Harriss, 347 U.S. 612 (1954)..... 10n
United States v. Maryland Savings-Share Ins. Corp., 400 U.S. 4 (1970) 11
United States v. Rumely, 345 U.S. 41 (1953)..... 10
Va. Pharmacy Bd. v. Va. Consumer Council, 425 U.S. 748 (1976) 7n

TABLE OF AUTHORITIES—Continued

	Page
Watkins v. United States, 354 U.S. 178 (1957)	9, 10
Webster Eisenlohr, Inc. v. Kalodner, 145 F.2d 316 (3d Cir. 1944), *cert. denied*, 325 U.S. 867 (1945)	30n
Williams v. Zbaraz, 448 U.S. 358 (1980)	30n
Zablocki v. Redhail, 434 U.S. 374 (1978)	11, 12
UNITED STATES CONSTITUTION:	
Article III, Section 8	8
First Amendment	4, 6n, 11, 12
Fifth Amendment	*passim*
FEDERAL STATUTES:	
36 U.S.C. §§ 90a *et seq.*	2
36 U.S.C. §§ 1151 *et seq.*	2
36 U.S.C. § 90c	20
36 U.S.C. § 90i(b)	19n
36 U.S.C. § 90f	20
36 U.S.C. § 1153	20
36 U.S.C. § 1156	20
38 U.S.C. § 213	28n
38 U.S.C. § 3301(d)	28
38 U.S.C. § 3401	26
38 U.S.C. § 3402	28
38 U.S.C. § 3402(a)(1)	26
38 U.S.C. § 3402(b)(1)	26
38 U.S.C. § 3404	26
38 U.S.C. § 3404(c)(2)	26
44 U.S.C. § 1332	20n
41 Stat. 284 (1919)	18n
43 Stat. 358 (1924)	18n
43 Stat. 535 (1924)	18n
46 Stat. 1481 (1931)	25n
Act of July 7, 1930, c. 849, 46 Stat. 994	28n
Act of June 17, 1932, c. 268, 47 Stat. 320	17, 18n
Act of June 22, 1944, c. 268, § 200(b), 58 Stat. 286	29
Act of March 4, 1925, § 16, 43 Stat. 1311	26n

TABLE OF AUTHORITIES—Continued

	Page
Federal Regulation of Lobbying Act, 2 U.S.C. § 266	9, 10n
Foreign Agents Registration Act of 1938, 22 U.S.C. §§ 611, 613	9
HUD-Independent Agencies Appropriation Act, 1983, Pub. L. 97-272, 96 Stat. 1173 (1982)	23
Internal Revenue Code of 1954, as amended, 26 U.S.C.:	
§ 162(e)	9
§ 170(c)(2)	5
§ 170(c)(3)	2, 5
§ 501(a)	1
§ 501(c)(3)	5, 6, 14
§ 501(c)(4)	1, 5
§ 501(c)(19)	5, 19, 21n
§ 501(h)(3)	9
§ 4945	9
Pub. L. 90-208, § 1, 81 Stat. 655 (1967)	19n
Pub. L. 96-385, 94 Stat. 1528 (1980)	27n
Revenue Act of 1924, c. 234, 43 Stat. 253	17n
Revenue Act of 1934, c. 277, 48 Stat. 680	17
Tax Equity and Fiscal Responsibility Act of 1982, Pub. L. 97-248, 96 Stat. 324 (1982)	21n
MISCELLANEOUS:	
78 Cong. Rec. (1934):	
p. 5959	15
p. 5961	15
p. 6712	17
p. 7816	16
1981 VA Ann. Rep.	22, 23n, 27n
Corporations Chartered by Act of Congress, Congressional Research Service, Library of Congress, Report No. 73-31 A (1973)	18
FY82 Legislative Recommendations of Veterans' Organizations: Hearings Before the Senate Comm. on Veterans' Affairs, 97th Cong., 1st and 2d Sess. (1982)	20, 24, 25

TABLE OF AUTHORITIES—Continued

Page

Historical Development of Veterans' Legislation Under Finance Committee Leadership, 116 Cong. Rec. 35037 (1970) 16

House Comm. on Veterans' Affairs, 97th Cong., 2d Sess., History of House Committee Considering Veterans Legislation, Comm. Print No. 93 (1982) 8

H. Rep. No. 1385, 73d Cong., 2d Sess. (1934) 16

IRS Publication No. 78, Cumulative List of Organizations Described in Section 170(c) of the Internal Revenue Code (1982) 2n

Joint Explanatory Statement of the Committee of Conference, H. Rep. No. 760, 97th Cong., 2d Sess. (1982), *reprinted in* [1982] U.S. Code Cong. and Ad. News No. 7 ..... 21n

Landis, *Constitutional Limitations on the Congressional Power of Investigation*, 40 Harv. L. Rev. 153 (1926) 9n

Legislative Recommendations of Veterans' Organizations, 1978: Hearings Before the House Comm. on Veterans' Affairs, 95th Cong., 2d Sess. (1978) 24, 25n

Rule VII, Standing Rules of the Senate 9

Sixty-First National Report of the Disabled American Veterans, 1981, H.R. Doc. No. 104, 97th Cong., 1st Sess. (1981) 20

S. Rep. No. 558, 73d Cong., 2d Sess. (1934) 15, 16

World War Veterans' Legislation: Hearings Before the House Comm. on World War Veterans' Legislation, 69th Cong., 1st Sess. (1925) 19

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

No. 81-2338

DONALD T. REGAN, SECRETARY OF THE TREASURY, *et al.*,

Appellants,

v.

TAXATION WITH REPRESENTATION OF WASHINGTON,

Appellee.

On Appeal from the United States Court of Appeals for the District of Columbia Circuit

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BRIEF *AMICI CURIAE* OF DISABLED AMERICAN VETERANS AND PARALYZED VETERANS OF AMERICA IN SUPPORT OF THE UNITED STATES

INTERESTS OF *AMICI CURIAE*

The Disabled American Veterans ("DAV") and the Paralyzed Veterans of America ("PVA"), *amici curiae* herein, are national nonprofit veterans' organizations. DAV and PVA are exempt from federal income taxation pursuant to Sections 501(a) and 501(c)(4) of the Internal Revenue Code,[1] and contributions to them are tax-

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[1] Citations to provisions of the Internal Revenue Code of 1954, as amended, 26 U.S.C. §§ 1 *et seq.*, will hereinafter be made to "Section ——."

deductible under Section 170(c)(3).[2] Both DAV and PVA are chartered by Acts of Congress, 36 U.S.C. §§ 90a *et seq.* and 1151 *et seq.*, and engage in a broad range of activities in furtherance of their charter purposes. Among those activities, each seeks to influence legislation and confines such effort essentially to matters directly or indirectly affecting veterans' benefits.

The importance of legislative activities to DAV and PVA is underscored by their memberships and the service each organization seeks to render. DAV, one of the nation's largest veterans' organizations with more than 2,500 chapters nationwide, has more than 700,000 members, each of whom possesses a service-connected disability. PVA, with 35 chapters across the United States and abroad, has 11,000 members who represent more than half of all American veterans with spinal cord injury or disease. DAV and PVA also conduct extensive service programs to assist their members and others in obtaining the benefits to which their status entitles them. DAV operates the largest national service program of all the nation's veterans' organizations; PVA's service program is uniquely skilled in assisting the catastrophically disabled.

The knowledge *amici* gain from interaction with their memberships and from experience with their service programs enables them to develop comprehensive views about the needs of veterans. Tax-deductible contributions, which constitute the great preponderance of their annual revenue, enable *amici* to communicate these views to Congress. However, the decision of the Court of Appeals now before this Court could force *amici* to choose between continuing their legislative programs unchanged and preserving the tax-deductibility of donations they receive. Because of *amici's* substantial interest in avoiding the necessity of such a choice, DAV and PVA sought unsuccessfully to

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[2] *See IRS Publication No. 78, Cumulative List of Organizations Described in Section 170(c) of the Internal Revenue Code* (1982).

intervene in this case as appellants,[3] and now seek to express their views to this Court as *amici curiae*.

SUMMARY OF ARGUMENT

Congress performs various constitutional functions with respect to veterans' affairs, the most important being legislation and oversight. The wise and effective performance of these functions depends upon the quality of information Congress obtains concerning the needs of veterans and the manner in which measures designed to serve those needs have been implemented. Congress knows that veterans' organizations possess a unique store of invaluable information on those subjects. The decision of Congress not to extend to veterans' organizations the same restriction on lobbying activities it imposed on charities in the Internal Revenue Code is a means to insure that veterans' organizations would continue to supply such vital information to Congress without impediment. That decision is thus one which serves the interests of Congress itself in the exercise of its constitutional powers and the discharge of its constitutional obligations.

The Court of Appeals considered only the speech interests of private entities when it analyzed the tax differential at issue. Congress's independent interests in receiving information were ignored. In consequence, the deference to a coordinate branch of government called for by the principle of separation of powers was reflected neither in the lower court's determination of the appropriate standard for equal protection review of the statutory classification, nor in the application of that standard. For these and other reasons, the Court of Appeals erred

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[3] *See* 50 U.S.L.W. 3998 (U.S. June 22, 1982). As officials of both DAV and PVA stated, *amici* were unaware of the pendency of this case until after the decision of the Court of Appeals en banc issued. *See* affidavits of Norman B. Harnett and R. Jack Powell, submitted as appendices to *amici's* Motion to Intervene, etc., filed herein on June 4, 1982.

in applying a "heightened level of scrutiny" to the classification and in concluding that "absolutely no governmental interest whatsoever" exists to support it. *Taxation with Representation of Washington v. Regan*, J.S. at 43a, 66a.[4]

In reviewing legislation which not only regulates the affairs of private persons in their relationship with public institutions, but which also directly affects Congress's ability to fulfill its own constitutional responsibilities, a court should show considerably greater deference to the judgment of Congress than was shown by the Court of Appeals. "[I]n no matter should [courts] pay more deference to the opinion of Congress than in its choice of instrumentalities to perform a function that is within its power." *Fullilove v. Klutznick*, 448 U.S. 448, 480 (1980). If such legislation is rationally related to the objective of assisting Congress in the performance of its constitutional functions, it is inappropriate, except perhaps in the most extreme case, for a court to declare such legislation invalid. Even disregarding the deference called for by the doctrine of separation of powers, the impact of the tax differential on appellee's fundamental rights under the First Amendment is not sufficiently direct or substantial to warrant application of a standard of review stricter than the rational basis test.

The tax differential here manifestly satisfies at least this standard of equal protection scrutiny. First, Congress enacted the lobbying restriction for the legitimate purpose of protecting itself from wealthy donors seeking to misuse the tax status of charities. Because of its greater familiarity with the lobbying activities of veterans' organizations, Congress had sound reason to believe that the membership and charter restrictions which applied

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[4] The opinion of the Court of Appeals is reported at 676 F.2d 715 (D.C. Cir. 1982), and reprinted in the appendix to the Jurisdictional Statement of the United States ("J.S."). Citations to the opinion will hereinafter be made to "*Taxation*, J.S. at ——."

uniquely to veterans' organizations made them less subject than charities to such abuse.

Second, Congress highly valued the information it obtained from veterans' organizations. This assessment, too, was soundly based because veterans' organizations were uniquely positioned to acquire information of particular relevance to Congress. Through communication with their memberships and the operation of their service programs that assist veterans' benefits claimants, veterans' organizations acquire valuable information about the needs of individual veterans as well as the functioning of the Veterans Administration. Such information is plainly of importance to the public policy decisions Congress must make regarding veterans' affairs. Congress's desire to obtain this information from veterans' organizations rationally justifies its refusal to extend the lobbying restriction to them.

ARGUMENT

THE INTERNAL REVENUE CODE'S DIFFERENT TREATMENT OF THE LOBBYING ACTIVITIES OF VETERANS' AND CHARITABLE ORGANIZATIONS DOES NOT VIOLATE THE EQUAL PROTECTION PRINCIPLE EMBODIED IN THE FIFTH AMENDMENT.

Organizations whose income is exempt from taxation under Section 501(c)(3), referred to generally as "charitable organizations," may receive tax-deductible contributions under Section 170(c)(2) but are limited in the proportion of their activities that can be devoted to lobbying. Veterans' organizations, exempt from income taxation under either Section 501(c)(4) or Section 501(c)(19), may receive tax-deductible contributions under Section 170(c)(3) without regard to the extent of their lobbying activity. *Amici* submit that the Court of Appeals' conclusion that this different tax treatment violates appellee's right to equal protection of the laws is

erroneous for two reasons.[5] First, the lower court failed to accord proper deference to the Congressional classification; second, it failed to identify and accord proper significance to the important governmental interests served by that classification.

I. The Court of Appeals Applied an Erroneous Standard of Review Because it Did Not Consider the Interests Congress Has as a Coordinate Branch of Government in the Tax Differential at Issue, and Because it Gave Undue Weight to the Effect of the Differential on Appellee's First Amendment Rights.

A. *The principle of separation of powers requires this Court to review the tax differential with great deference, because the classification assists a coordinate branch of government to perform its constitutional functions.*

In analyzing the equal protection issue in this case, the Court of Appeals amply considered appellee's interest in speaking, but did not consider at all Congress's independent interest in receiving information. Indeed, since the lower court gave no weight to Congress's power to obtain information and to obtain it in the manner that best enables it to discharge its own constitutional obligations, the court's analysis would have been no different had this case involved only appellee's right to address the public generally, rather than its right to communicate directly with Congress. *Amici* will demonstrate that a substantial reason supporting Congress's different tax

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[5] The Court of Appeals rejected appellee's claim that the lobbying restriction in Section 501(c)(3) violated its First Amendment rights and that it was therefore entitled to exemption from federal income taxation despite its stated intention not to comply with that restriction. *Taxation*, J.S. at 34a-35a. It is the understanding of *amici* that appellee's First Amendment argument is not now before the Court because its cross-appeal has not been allowed and because the United States' appeal did not raise that issue. Accordingly, *amici* will not address the First Amendment issue raised below.

treatment of veterans' organizations is to facilitate Congress's receipt of information that is uniquely possessed by those organizations and vital to the effective performance of Congress's constitutional functions as they bear upon veterans' programs.[6] *See* pp. 21-29, *infra*. Since the lower court did not consider the interest of Congress in informing itself, the court's application of a "heightened level of scrutiny," *Taxation*, J.S. at 40a, did not reflect that degree of deference customarily employed by the judiciary when reviewing the validity of acts of a coordinate branch of government which further that branch's own constitutional performance. But as this Court has observed, "in no matter should we pay more deference to the opinion of Congress than in its choice of instrumentalities to perform a function that is within its power." *Fullilove v. Klutznick*, 448 U.S. 448, 480 (1980) (plurality opinion) (rejecting an equal protection challenge to an exercise of Congress's spending power).

Congress employs many devices to inform itself. It has created entities like the Congressional Budget Office, the Office of Technology Assessment, and the Congressional Research Service of the Library of Congress to that end. Its Members employ large staffs, and undertake worldwide fact-finding missions. It requires regular reports from the Executive Branch and the independent agencies regarding their activities. Through its committees, which also employ large staffs, it conducts hearings on a broad variety of subjects. In the hearing process, Congress invites willing witnesses to appear, and, through its subpoena and contempt powers, compels the appearance of those reluctant to come forward. It is particu-

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[6] Because of the independent constitutional significance of the use to which Congress puts information it obtains to carry out its responsibilities, *amici* will not address the role which the right to hear might play in the equal protection analysis if the recipient were a private entity without public responsibilities. *See, e.g., Va. Pharmacy Bd. v. Va. Consumer Council*, 425 U.S. 748, 756-7 (1976).

larly with respect to the hearing process that the tax differential challenged by appellee can be shown to serve an especially useful governmental purpose.

Veterans' organizations are unique sources of information that Congress has traditionally found to be extremely helpful in formulating public policy with respect to the nation's veterans. When Congress found it necessary to restrict the lobbying expenditures which certain organizations could make if they desired to maintain their tax status, it could reasonably have assumed that extension of the restriction to veterans' organizations would have reduced their willingness to provide information to Congress for fear of jeopardizing their tax status. Congress's decision not to extend the lobbying restriction to veterans' organizations is surely preferable to the alternatives of having to resort to compulsory process to obtain their views, or having to remove the restriction altogether, leaving unresolved the problem concerning charitable organizations that led to its enactment.

There are three primary constitutional functions of Congress which the provision of information by veterans' organizations, and therefore the tax differential, can distinctively assist Congress in performing. The most obvious is the legislative function, Art. 1, § 8, U.S. Const., a vital task in the area of veterans' programs: "Legislation relating to veterans has played an important role in the activity of every Congress since the founding of our Nation." *House Comm. on Veterans' Affairs, 97th Cong., 2d Sess., History of House Committees Considering Veterans Legislation* 1, Comm. Print No. 93 (1982). A second and related Congressional function is the "informing function," understood to be the manner by which "Congress informs itself collectively by way of hearings of its committees." *Hutchinson v. Proxmire*, 443 U.S. 111, 132 (1979). A third, and also related, function is that of oversight, which "encompasses inquiries concerning the administration of existing laws as well as proposed or

possibly needed statutes." *Watkins v. United States*, 354 U.S. 178, 187 (1957).[7]

The decision of Congress not to extend the lobbying restriction to veterans' organizations is one which furthers the exercise of Congress's constitutional powers to legislate, inform itself and oversee the administration of federal laws. It represents only one of a number of ways in which some who would seek to influence Congressional decisions are treated differently from others with the same objective by the Internal Revenue Code and other provisions adopted by the Congress. *See, e.g.*, Section 4945 (subjecting private foundations to a special penalty tax if they engage in any lobbying); Section 501(h)(3) (precluding, *inter alia*, churches and certain tax-exempt supporting organizations from electing the liberalized lobbying rules available to Section 501(c)(3) organizations generally); Section 162(e) (permitting a business deduction for certain lobbying activities but not others); Federal Regulation of Lobbying Act, 2 U.S.C. § 266 (imposing the requirements of the Act on some, but not others, who would attempt to influence federal legislation); Foreign Agents Registration Act of 1938, 22 U.S.C. §§ 611(c)(1)(iv) and 613 (requiring in part the registration of some, but not others, who would make representations to the Congress); and Rule VII, Standing Rules of the Senate (requiring different treatment of petitions to the Congress by different classes of petitioners).

For evident reasons, challenges to actions taken by Congress to obtain needed information have generally been made by recalcitrant witnesses who object to compulsory process,[8] not by volunteers whose willingness to

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[7] The unique assistance that veterans' organizations can offer Congress in perfoming these functions is described at pp. 21-29, *infra*.

[8] *See generally* Landis, *Constitutional Limitations on the Congressional Power of Investigation*, 40 Harv. L. Rev. 153 (1926).

come forward has been treated less favorably than others, as in the contexts just discussed.[9] But the nature of the challenge is the same in the sense that it calls into question Congress's fundamental power, as a co-equal branch of government, to determine what information it requires to perform its constitutional functions and how best to obtain that information. The same standard of review should therefore apply. That standard is variously expressed in terms of giving "great weight to the decisions of Congress," *Fullilove*, *supra* p. 4, 448 U.S. at 472; the need for the Court to "tread warily," *United States v. Rumely*, 345 U.S. 41, 46 (1953) (conviction for contempt of Congressional committee reversed); and the need to give Congress "ample scope" in its legislative decisions, *Watkins*, *supra* p. 9, 354 U.S. at 215 (also reversing a contempt of committee conviction).[10] The level of equal protection scrutiny most consistent with this standard is the rational basis test.[11]

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[9] Indeed, *amici* know of no instance in which it has been suggested that Congress's decision to invite, subpoena, or encourage a particular witness or class of witnesses to present their views on a specified subject necessitates equal treatment of others who wish to be similarly heard on the same subject.

[10] Such deference is particularly appropriate when Congress is seeking information that affects the national defense. This Court has recognized that veterans' benefits are clearly related to the government's "substantial interest in raising and supporting armies," *Johnson v. Robison*, 415 U.S. 361, 385 (1974), and has recently reaffirmed that "in no area has the Court accorded Congress greater deference than in the conduct and control of military affairs." *McCarty v. McCarty*, 453 U.S. 210, 236 (1981).

[11] *Cf. United States v. Harriss*, 347 U.S. 612 (1954), in which the Court, in upholding the Federal Regulation of Lobbying Act against a constitutional challenge, concluded that "[t]o do [otherwise] would be to deny Congress in large measure the power of self-protection." 347 U.S. at 625-626. A similar deference is warranted here, because to do otherwise would be to deny Congress the equally important power to inform itself.

B. *The tax differential does not sufficiently affect the exercise of appellee's fundamental rights under the First Amendment to justify abandonment of traditional deference to legislative classifications.*

Even if Congress's independent interest in receiving information were not involved in this case, traditional equal protection analysis would mandate review of this classification under a rational basis standard. A starting point for analysis is the Court's observation that in the area of taxation, "legislatures possess the greatest freedom in classification." *Madden v. Kentucky*, 309 U.S. 83, 88 (1940); *see also San Antonio School Dist. v. Rodriguez*, 411 U.S. 1, 41 (1973). In this mode of deference, "a legislative classification must be sustained if the classification itself is rationally related to a legitimate governmental interest," *U.S. Department of Agriculture v. Moreno*, 413 U.S. 528, 533 (1973), a standard fully applicable to distinctions drawn by Congress in the Internal Revenue Code. *See, e.g., United States v. Maryland Savings-Share Ins. Corp.*, 400 U.S. 4 (1970).

The only argument available in this case to support a stricter standard of review rests on the impact of the lobbying restriction on the exercise of appellee's fundamental rights under the First Amendment. But the fact that a challenged classification has some incidental effect on the exercise of a fundamental right is not sufficient to raise the level of scrutiny under which its validity is measured. Rather, it is the "directness and substantiality of the interference" with such exercise that determines the standard. *Zablocki v. Redhail*, 434 U.S. 374, 386-7 (1978) (holding invalid a classification which did so affect the right to marry). The Court there observed:

> [W]e do not mean to suggest that every state regulation which relates in any way to the incidents of or prerequisites for marriage must be subjected to rigorous scrutiny. To the contrary, *reasonable* regulations that do not *significantly* interfere with

> decisions to enter into the marital relationship may legitimately be imposed.

Id. at 387 n.12 (emphasis added) (distinguishing *Califano v. Jobst*, 434 U.S. 47 (1977), in which such "reasonable" regulations of the right to marry were upheld).

The Court of Appeals itself indicated the absence of such significant interference with a fundamental right in this case when it held, in a portion of its opinion that is not before the Court, *see* note 5, *supra*, that appellee "has not shown that Section 501(c)(3)'s lobbying restriction abridges its First Amendment rights." *Taxation*, J.S. at 35a. The restriction to which charitable organizations are subject is no more an infringement of their First Amendment rights than was the prohibition, upheld by this Court in *Cammarano v. United States*, 358 U.S. 498 (1959), against the deduction of lobbying expenses by businesses. The Section 501(c)(3) restriction, like that in *Cammarano*, "is plainly not 'aimed at the suppression of dangerous ideas.'" *Id.* at 513.

A similar relationship between a challenged classification and a fundamental right was presented in *Johnson v. Robison*, *supra* note 10, 415 U.S. 361 (1974). There, a conscientious objector claimed that denial to him of veterans' benefits interfered with his fundamental right to the free exercise of religion. The Court reasoned:

> [S]ince we hold . . . that the Act does not violate [Robison's] right of free exercise of religion, we have no occasion to apply to the challenged classification a standard of scrutiny stricter than the traditional rational-basis test.

Id. at 375 n.14. Given the conclusion of the Court of Appeals that the tax differential does not abridge appellee's First Amendment rights, there is equally "no occasion" here to look for more than rationality in the statutory scheme.

Buckley v. Valeo, 424 U.S. 1 (1976), relied on by the Court of Appeals, is not to the contrary. In *Buckley*,

the Court distinguished earlier cases in which it had applied "exacting scrutiny" to "direct burdens" on access to the electoral process, and found that because the public financing provisions under review were "less restrictive," they did not call for application of the higher standard. 424 U.S. at 94. The Court then observed that "[i]n any event," those provisions furthered "sufficiently important governmental interests." *Id.* at 95. The latter observation, unnecessary as it was to the decision in the case, is hardly a warrant for the Court of Appeals to have said that in applying a more demanding standard than a rational basis it was "guided by" *Buckley*. *Taxation*, J.S. at 41a.

Other courts have continued to defer to legislative classifications even where, as in *Buckley*, they have had some impact on fundamental rights. *See, e.g., Johnson v. United States*, 422 F. Supp. 958, 971-2 (N.D. Ind. 1976), *aff'd sub nom. Barter v. United States*, 550 F.2d 1239 (7th Cir. 1977) (explicitly adopting the District Court's opinion), *cert. denied*, 434 U.S. 1012 (1978) (upholding the differential tax treatment between married and unmarried couples despite the fact that it "*may* constitute a penalty" on "a right as fundamental as that of marriage," because of considerations of "judicial deference" and "the inherently complex nature of legislative decisions in the field of taxation"). The classification at issue here should be accorded a similar deference.

II. Substantial Governmental Interests Support the Different Tax Treatment of Lobbying by Veterans' and Charitable Organizations.

The Court of Appeals concluded that "absolutely no governmental interest whatsoever" exists as a basis for the statutory classification in Section 501(c). *Taxation*, J.S. at 66a. *Amici* contend that in drawing this conclusion, the Court of Appeals failed to identify and give proper weight to unique characteristics of veterans' organizations which distinguish them from charities with

respect to lobbying, and did not consider and give effect to Congress's constitutional interests in informing itself.[12] These differences underlie both the absence of reasons to extend the Section 501(c)(3) restriction to veterans' organizations, and the presence of substantial reasons to refrain from such an extension.

A. *The reason for restricting the lobbying activities of charitable organizations does not apply with equal force to veterans' organizations.*

The Court of Appeals acknowledged that when Congress originally enacted the lobbying restriction of Section 501(c)(3)'s predecessor provision in 1934, it was doing so in part "to restrict selfishly motivated political agitation, meant to secure some personal interests of the donor . . . ," *Taxation*, J.S. at 61a, and "to curb what it regarded as abuses by Section 501(c)(3) organizations then eligible to use tax-deductible contributions for lobbying activities." *Id.* at 58a. The lower court suggested, however, that confining the expenditure restriction to charities rather than extending it to such groups as veterans' organizations "may simply have been a drafting oversight . . . ." *Id.* at 52a. The lower court also stated: "There is no evidence whatsoever that the lobbying of veterans is less subject to abuse by private interests than that of other Section 501(c) groups." *Id.* at 64a-65a. *Compare* note 12, *supra*.

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[12] These omissions are not entirely surprising because, as the Court of Appeals observed with respect to support offered to justify the challenged classification: "The government made no attempt in the district court to present affidavits or other evidentiary materials." *Taxation*, J.S. at 49a. The factual record herein is also scant because this case came on for decision on cross motions for summary judgment. Despite these deficiencies in the record and veterans' organizations' lack of opportunity to participate in the proceedings below, however, *see* note 3, *supra*, *amici* will rely primarily upon a substantial body of material developed from public records and reports to support their arguments which follow.

Amici disagree with the Court of Appeals on both points. First, there can be no doubt that Congress deliberately chose to restrict the activities charities could undertake to influence legislation, and not to restrict such activities by veterans' organizations. Second, there were sound reasons in 1934, which persist today, for Congress to believe that veterans' organizations present less risk than charities that they would abuse their tax-deductible status in their lobbying activities.

An examination of the legislative history of the lobbying restriction shows that Congress was aware that it would not apply to veterans' organizations, but decided not to revise the provision to include them. The lobbying restriction was initially contained in the revenue bill reported by the Senate Finance Committee, which had added the restriction to the House bill by amendment. H.R. 7835, §§ 23(o) and 101(d), accompanying S. Rep. No. 558, 73d Cong., 2d Sess. (1934). In explaining this amendment, Senator Harrison, chairman of the Finance Committee and the Senate sponsor of the revenue bill, stated in the floor debate on the measure:

> [T]here are *certain organizations* which are receiving contributions in order to influence legislation and carry on propaganda. The committee thought there ought to be an amendment to stop that, so that is why we have put this amendment in the bill.

78 Cong. Rec. 5959 (1934) (emphasis added). Senator Harrison noted that as written, the amendment would not apply the restriction to all types of organizations, and specifically pointed out that veterans' organizations were not affected. *Id.* at 5961. Nonetheless, the bill as amended was passed by the Senate, with the understanding that the conference committee could resolve "any inequity." *Id.* at 5959.

The only revision that emerged from the conference, however, was the deletion of Senate language which would have extended the restriction to "participation

in partisan politics" as well as lobbying. H. Rep. No. 1385, 73d Cong., 2d Sess. (1934); 78 Cong. Rec. 7816 (1934). Moreover, the Conference Committee adopted Senator Harrison's reference to "certain organizations," H. Rep. No. 1385, 73d Cong., 2d Sess. 17 (1934), rather than the formulation of the Senate Report, which had referred to "an" organization in describing the entities to which the restriction applied. S. Rep. No. 558, 73d Cong., 2d Sess. 26 (1934).

It is thus clear that the Conference Committee explicitly considered the provision containing the challenged restriction, in terms of both the language of the provision and the Committee's explanation of that provision. Since the ultimate version of the provision nonetheless remained, as Senator Harrison had pointed out, inapplicable to veterans' organizations, it seems hardly supportable to maintain that this result stemmed from Congress's "lack of attention" to the matter. *Taxation*, J.S. at 56a.

As to the second point, Congress not only persisted in leaving veterans' groups unrestricted by the tax provision, but also implicitly determined that to do so would not create the "inequity" which the conference was expected to resolve. The conclusion that it was equitable not to extend the restriction to veterans' organizations was soundly based, as the committee which originated the lobbying restriction well knew.

In 1934 the Finance Committee, in addition to its responsibilities for tax legislation, was also the Senate committee with jurisdiction over most veterans' programs. *See Historical Development of Veterans' Legislation Under Finance Committee Leadership*, 116 Cong. Rec. 35037 (1970). This expertise in veterans' affairs, necessarily including knowledge of the nature of veterans' organizations, was thus possessed not only by the body that originated the lobbying restriction, but also by the Conference Committee that reported the legislation as passed, participants in which were Senator Har-

rison and other members of the Senate Finance Committee. 78 Cong. Rec. 6712 (1934).

Several factors unique to veterans' organizations were present in 1934 which provided a basis for Congressional confidence that they were less likely than charities to abuse their tax status in their lobbying activities.[13] Most significant for present purposes were membership restrictions, which tended to confine the activities of veterans' groups to those issues that were of common interest to their diverse members (essentially, veterans' benefits issues); federal charters and reporting requirements, which made veterans' groups more subject than charities to Congressional control; and, compared with charities, fewer numbers of veterans' groups and more regular Congressional exposure to them, which allowed for greater Congressional familiarity with their legislative activities.

There were two federal sources of membership restrictions applicable to veterans' organizations. First, Section 23(o)(4) of the Revenue Act of 1934, c. 277, 48 Stat. 680, 690, made deductible contributions to "posts or organizations of *war* veterans" (emphasis added). Second, federal charters of veterans' organizations imposed restrictions of similar effect. For example, Section 5 of DAV's charter then provided that no person could be a member of DAV unless he or she were disabled during World War I and were honorably discharged. Act of June 17, 1932, c. 268, 47 Stat. 321. Thus, unlike charities, to which no such membership restrictions applied, veterans' groups were from the outset organizations whose members were united not by

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[13] For a decade before the enactment under discussion, Congress had been treating charities separately from veterans' organizations in the Internal Revenue Code. In 1924, veterans' organizations were given separate recognition in the code, with Section 214(a)(10)(A) providing for tax-deductible contributions to charities while Section 214(a)(10)(D) did the same for veterans' organizations. Revenue Act of 1924, c. 234, 43 Stat. 253.

a common political or ideological outlook but by the common experience of service to their country in uniform. As such, veterans' organizations would be peculiarly resistant to efforts by those who would make tax-deductible donations in order to advance their own "personal interests" before the Congress. The object of veterans' groups' legislative activity, derived from the consensus of their memberships, would predictably be the advancement of veterans' programs, the benefits of which would inevitably be enjoyed by large numbers of persons even if they also served a particular donor's "personal interests." Such an outcome could not reasonably be said to constitute the abuse Congress was seeking to avoid.

A further basis for Congressional belief that veterans' organizations were less likely than charities to abuse their lobbying privileges lay in the federal charters that governed the major veterans' organizations.[14] The significance of federal charters is that, unlike the general body of law enacted by the States to which charities are generally subject, there is no general body of law applicable to the operation and powers of corporations chartered by the Congress. Individual provisions are therefore included in each Act of Congress incorporating the organization. *See generally Corporations Chartered by Act of Congress*, Congressional Research Service, Library of Congress, Report No. 73-31 A (1973). Such enactments not only set forth limited purposes of the chartered organizations,[15] but because they are part of

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[14] By 1934, Congress had provided federal charters to at least four veterans' groups: the American Legion, 41 Stat. 284 (1919), the Grand Army of the Republic, 43 Stat. 358 (1924), the United States Blind Veterans of the World War, 43 Stat. 535 (1924), and *amicus curiae* herein, the Disabled American Veterans, 47 Stat. 320 (1932).

[15] For example, DAV's charter included the purpose "to advance the interest and work for the betterment of all wounded, impaired and disabled veterans of the World War." Act of June 17, 1932, c. 268, 47 Stat. 320-21.

federal law, they can be amended by Congress as it sees fit.[16] Thus, by 1934 Congress had already restricted the activities in which major veterans' groups could engage, and was free to restrict them further if, for example, their lobbying appeared to represent an abuse of their tax status.

Finally, Congress had greater familiarity with the scope of legislative activities undertaken by veterans' organizations because of their substantially fewer numbers, *cf. Taxation*, J.S. at 73a, and the unique relationship that had developed even then between Congress and the major veterans' organizations in the legislative process. *See* pp. 24-25, *infra*. For example, at the beginning of each session of Congress those groups participate in hearings before the cognizant Congressional committees to present their proposals for legislative and budgetary action, without regard to any pending legislation. This unusual practice had its antecedents before the 1934 legislation. *See, e.g., World War Veterans' Legislation: Hearings Before the House Comm. on World War Veterans' Legislation*, 69th Cong., 1st Sess. (1925) (including appearance by DAV). Congress was thus better informed about the scope and nature of legislative activities by veterans' organizations than about those by charities, and was therefore better able to appraise the risk of lobbying abuses that veterans' organizations might present.

These features distinguishing veterans' organizations from charities continue today. Membership restrictions on veterans' organizations have emerged in additional statutory provisions. *See, e.g.*, Section 501(c)(19) (requiring that at least 75% of the membership of a veterans' organization be past or present members of the Armed Forces of the United States). Federal char-

[16] For example, in 1967 DAV's charter was amended to add 36 U.S.C. § 90i(b), calling in part for DAV to submit to the Comptroller General for auditing purposes a report of all its receipts and expenditures. Pub. L. 90-208, § 1, 81 Stat. 655 (1967).

ters still restrict the organizations' purposes, as with respect to DAV (36 U.S.C. § 90c) and PVA (36 U.S.C. § 1153), and state that each organization is nonpolitical and may not promote the candidacy of any person seeking public office. 36 U.S.C. §§ 90f (DAV) and 1156 (PVA). The practice of annual appearances by the major veterans' groups to present their recommendations to the Congress also continues. *See, e.g., FY82 Legislative Recommendations of Veterans' Organizations: Hearings Before the Senate Comm. on Veterans' Affairs*, 97th Cong., 1st and 2d Sess. (1982) ("1982 Senate Hearings") (including legislative recommendations of DAV and PVA).

Moreover, *amici* engage in significant self-regulation. For example, DAV is careful to confine the scope of its legislative activities by adopting a "Statement of Policy" at each annual convention that provides, in part, that the organization "will not take action on any resolution that proposes legislation designed to provide benefits for other than wartime, service-connected disability." *See, e.g., Sixty-First National Report of the Disabled American Veterans, 1981*, H. R. Doc. No. 104, 97th Cong., 1st Sess. 47 (1981);[17] *see also* note 24, *infra*, and accompanying text.

With the foregoing mechanisms in place and available to impose additional restrictions if the need arose, Congress had no need to impose on veterans' organizations the broad prophylactic of the lobbying restriction that it used to limit charities' potential for lobbying abuse. Congress had already employed legislative means individually tailored to veterans' groups that accomplished essentially the same end, and it was well acquainted with

[17] In 1970, Congress reenacted and codified earlier laws providing that the proceedings of the annual conventions of a number of veterans' organizations, including DAV, be printed at public expense as official documents of the House of Representatives. *See* 44 U.S.C. § 1332.

the effect of those means. These and other circumstances persist today to yield at least as acceptable a result, as demonstrated by Congress's 48-year refusal to extend the lobbying restriction to veterans' organizations.[18]

B. *The substantial governmental interest of assisting Congress to perform its constitutional functions is served by confining the lobbying restriction to charities, thereby preserving unimpeded the flow to Congress of information uniquely possessed by veterans' organizations and important to effective Congressional actions concerning veterans' affairs.*

In considering the governmental interests served by the tax classification in this case, the Court of Appeals discussed purposes relating to lobbying by businesses, the interests of veterans' organizations, and concerns about charitable organizations. *Taxation*, J.S. at 46a-62a. The court gave no consideration, however, to the independent interests of Congress in receiving information from veterans' organizations.[19]

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[18] If Congress had wanted to extend the restriction to veterans' organizations, an opportune time to have done so would have been this year, when it revised a subsection of Section 501(c) that specifically applied to veterans' organizations. *See* 26 U.S.C. § 501(c)(19), as amended by Section 354(b) of the Tax Equity and Fiscal Responsibility Act of 1982 ("TEFRA"), Pub. L. 97-248, 96 Stat. 324. That section of TEFRA expands the types of organizations that fit within the Section 501(c)(19) exemption. The possibility of extending the lobbying provision did not even arise during consideration of the amendment. *See, e.g.*, Joint Explanatory Statement of the Committee of Conference, H. Rep. No. 760, 97th Cong., 2d Sess. 679 (1982), *reprinted in* [1982] U.S. Code Cong. and Ad. News No. 7, at 666-667.

[19] The Court of Appeals also confined itself to interests actually relied upon in the legislative record. *Taxation*, J.S. at 49a, 65a n.44. Whatever the validity of that proposition when a heightened level of scrutiny is applied to a legislative classification, the appropriate standard of review in this case is rationality, as *amici* have argued. The Court of Appeals' reliance on *Califano v. Goldfarb*, 430 U.S. 199 (1977), is thus misplaced because the gender-based classification there was held to a higher level of scrutiny than is called for

Amici submit that Congress rationally seeks to be well informed about the needs of veterans and programs designed to meet those needs; that veterans' organizations possess information of special value to Congress in evaluating those needs and programs; and that by not extending the lobbying restriction to veterans' organizations, Congress rationally furthered the substantial governmental interest in the effective performance of its constitutional duties.

As observed earlier, *supra* p. 8, veterans' legislation "has played an important role in the activity of every Congress since the founding of our Nation." Congressional commitment to veterans is substantial, due in part to the extraordinary service these men and women have rendered;[20] in part to the need to provide a sufficient incentive to future generations to serve in the armed forces, *see* note 10, *supra*; and in part to the sheer size of the veteran community. The Veterans Administration ("VA") estimated that in 1981 over 30 million Americans were veterans. 1981 VA Ann. Rep. 3.[21] The

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by the rational basis test. *Id.* at 210. Accordingly, the classification at issue here should "not be set aside if any state of facts reasonably may be conceived to justify it." *Dandridge v. Williams*, 397 U.S. 471, 485 (1970). Even if more rigorous scrutiny were appropriate, however, this Court should still consider the interests of Congress itself as bases for the legislative classification at issue. These interests are not only "conceivable," but actual, in that they inherently underlie any distinction drawn in a statute regulating communication with the Congress which has the effect of preserving such communication.

[20] Veterans occupy a special position in our national life. In order to defend our collective freedoms, veterans have suffered restriction of their personal freedom and *"the mental and physical hazards as well as the economic and family detriments"* that are implicit in military service. *Johnson v. Robison*, *supra*, 415 U.S. 361, 379-380 (emphasis in original). The Government has set forth some of the important reasons for favoring veterans, J.S. at 19-20, and the dissent below has identified others. *Taxation*, J.S. at 115a.

[21] The VA's 1981 Annual Report continues:

> Living veterans are only a part of the total number of potential recipients of VA benefits. As of September 30, 1981, . . .

VA budget for fiscal 1983 exceeds $24 billion. HUD-Independent Agencies Appropriation Act, 1983, Pub. L. 97-272, 96 Stat. 1173-1176 (1982).

To provide benefits and preferences for veterans on such a scale is unquestionably within Congress's constitutional power. *See, e.g., Personal Adm'r v. Feeney*, 442 U.S. 256 (1979). In furtherance of that objective, Congress is entitled to seek information from a variety of sources about the needs of veterans and about the effectiveness of legislative efforts to provide for those needs. As this Court long ago recognized:

> A legislative body cannot legislate wisely or effectively in the absence of information respecting the conditions which the legislation is intended to affect or change; and where the legislative body does not itself possess the requisite information—which not infrequently is true—recourse must be had to others who do possess it.

McGrain v. Daugherty, 273 U.S. 135, 175 (1927).

In this case, those "who do possess" the "required information" are veterans' organizations. The unique relationship that these organizations have with both individual veterans throughout the United States, and the VA as the principal agency which administers veterans' programs, has led Congress to recognize that they serve a special office in helping Congress discharge its various functions with respect to veterans' affairs.

The degree and nature of veterans' organizations' involvement in the hearing process is evidence of Congress's special interest in the information they have to provide. For example, during calendar year 1981, DAV

> the total population of beneficiaries [was] some 89.5 million, or approximately ***39 percent of the resident population of the United States.***

1981 VA Ann. Rep. 4 (emphasis added).

and PVA provided formal testimony before committees of Congress on at least fifty occasions, more than forty of which were before the Veterans' Affairs Committees (or subcommittees thereof) of the House or Senate.[22] Of course, these appearances could not have occurred absent the desire of Congress to hear from DAV and PVA.[23] Furthermore, on each occasion, the testimony provided by DAV and PVA concerned the needs of and provision of benefits to veterans, or the administration of programs directly affecting veterans, and was thus confined to the subject matter of their particular competence which warrants the Congessional attention such testimony receives.[24]

Another manifestation of Congress's unusual reliance on the provision of information by veterans' organizations lies in the special hearings held before the Veterans' Affairs Committees of both Houses of Congress at the start of each session. At these hearings, each of the major veterans' organizations is invited to present its legislative and budgetary proposals. *See, e.g.*, 1982 Senate Hearings, *supra* p. 20; *Legislative Recommendations of Veterans' Organizations, 1978: Hearings Before the House Comm. on Veterans' Affairs*, 95th Cong., 2d

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[22] These appearances of DAV and PVA are a matter of public record, contained in committee prints of proceedings before the full committee or a subcommittee of the Veterans' Affairs Committees of the House and Senate; the Budget, Appropriations, Government Operations, and Ways and Means Committees of the House; and the Appropriations and Labor and Human Resources Committees of the Senate.

[23] For example, in calendar year 1981 DAV alone received and has on file 38 formal invitations to present its views before the House and Senate Veterans' Affairs Committees.

[24] See text accompanying note 17, *supra*. The history of the legislative activities of *amici*, therefore, bears little resemblance to the spectre, conjured up by the Court of Appeals, of veterans' organizations "lobbying on any side of any issue they choose . . . ." *Taxation*, J.S. at 77a.

Sess. (1978) ("1978 House Hearings").[25] As Chairman Simpson of the Senate Veterans' Affairs Committee stated during such hearings conducted this year:

> These annual presentations give us on the Committee an excellent opportunity for members to become more familiar with the views of the membership of veterans' organizations on the legislative needs relating to veterans. These sessions assist the committee in planning its priorities for the year.

1982 Senate Hearings at 60. This consistent, formalized procedure to obtain the views of non-governmental entities in helping set a Congressional committee's legislative agenda is, so far as *amici* are aware, unique in the legislative process, and these hearings have been conducted since before the enactment of the lobbying restriction at issue. *See* p. 19, *supra*.[26]

Because veterans' organizations have a special relationship with both individual veterans and the VA, it is manifestly reasonable for Congress to seek information from them. Their knowledge of the needs of veterans derives directly from their large and diverse memberships and from their service programs for members and others. DAV, for example, has over 700,000 members, while PVA's membership of 11,000 represents more than half of all American veterans with spinal cord injury or disease. DAV has approximately 2,500 subordinate organizations nationwide, while PVA has chapters in 35 states, Mexico and Puerto Rico. Communication among these many

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[25] This procedure has become so well established that frequently, a veterans' organization witness will appear one day before the House committee and the next day before the Senate committee. 1978 House Hearings at 1 (statement of Chairman Roberts).

[26] Other indicia of Congressional interest in the views of veterans' organizations include Congress's decision to print as public documents the proceedings of the annual conventions of major veterans' groups, *supra* note 17. This decision also preceded the enactment of the 1934 lobbying restriction. *See, e.g.*, 46 Stat. 1481 (1931) (extending the privilege to DAV).

widely dispersed veterans, their local chapters and their national organizations occurs at many levels, from informal oral contacts through annual national conventions. Plainly, this interaction intimately acquaints veterans' organizations with the widest range of concerns of individual veterans and thus uniquely positions those groups to suggest to Congress remedial legislation and other measures bearing on veterans' needs.

The service programs operated by veterans' organizations, supplying essential advocacy assistance otherwise unavailable to claimants for veterans' benefits, also enable those organizations to provide Congress with a unique perspective on individual veterans' needs. Despite the magnitude of benefit programs for which veterans are eligible, Congress has effectively barred veterans from obtaining the assistance of private counsel to secure those benefits. Under the claims procedures set forth in Title 38 of the United States Code, the Administrator of Veterans' Affairs must recognize individuals, 38 U.S.C. § 3404(a), or representatives of national organizations (expressly including DAV), 38 U.S.C. § 3402(a)(1), before such individuals or representatives may prepare, present or prosecute any claim under laws administered by the VA. 38 U.S.C. § 3401. Moreover, neither recognized representatives nor recognized individuals may charge a fee to their clients, 38 U.S.C. §§ 3402(b)(1) and 3404, and the VA is authorized to pay only recognized individuals a maximum of $10 per claim. 38 U.S.C. § 3404(c)(2).[27]

The practical effect of these provisions is to require any potential beneficiary of a veterans' program who

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[27] As is the case with other important features of Congress's relationship with veterans' organizations, the provisions for VA (then called the U.S. Veterans' Bureau) recognition of representatives of national organizations, including DAV, and limiting to $10 the payment that the VA may make to recognized individuals, predate the 1934 lobbying restriction. *See* Act of March 4, 1925, § 16, 43 Stat. 1311.

needs advice about making a claim for benefits normally to seek out a recognized representative of a national veterans' organization if the VA itself is unable to provide that assistance.[28] The experience thus gained by veterans' organizations enables them to provide Congress with information unavailable from any other source.[29]

Congress has demonstrated a singular interest in serving the needs of veterans with service-connected disabilities.[30] Understandably, Congress would look particularly to DAV and PVA for information about these veterans because of the nature of *amici's* memberships and purposes. Moreover, it will be such veterans who likely will first have need for government assistance when they leave military service, and it will be DAV and PVA to

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[28] To provide a sense of scale, in fiscal year 1981 over 68,000 claims denials were appealed to the VA's Board of Veterans' Appeals. 1981 VA Ann. Rep. 95.

[29] Of all national veterans' organizations, DAV and PVA are particularly well qualified to be of assistance to Congress in this regard. DAV operates the largest national service program in the United States. Currently staffed by 267 national service officers employed in 68 cities across the country, the program provides counselling for veterans and their families concerning VA disability benefits, rehabilitation programs and other available services. These officers, all of whom undergo extensive training by DAV, also act as attorneys in fact for veterans who wish them to do so. As such, during the year ending June 30, 1981, DAV officers assisted veterans and their families to secure almost one billion dollars in retroactive annual and new monthly benents from the federal government. DAV makes these services available not only to its own members but also to all veterans. PVA, too, operates a national service program, employing 50 full time service officers in 44 offices throughout the United States. PVA's national service program accounts for more than 60% of its annual budget.

[30] Medical programs accounted for approximately 30% of the VA's budget in fiscal year 1981. 1981 VA Ann. Rep. 95. In addition, disabled veterans are entitled to compensation and pension payments, and Congress recently increased the rate of compensation for veterans with service-connected disabilities, and their survivors, by 14.3%. Pub. L. 96-385, 94 Stat. 1528 (1980).

whom they will likely first turn in the private sector for help in meeting those needs. Congress can therefore legitimately expect that the views of DAV and PVA would be important in responding with prompt effectiveness to needs as to which Congress has been particularly solicitous.

A unique relationship also exists between veterans' organizations and the VA, and this, too, gives veterans' organizations distinctive information relevant to Congressional functions. Upon recognition of representatives of veterans' organizations as described above, the Administrator is empowered to furnish "space and office facilities for the use of paid full-time representatives of national organizations so recognized." 38 U.S.C. § 3402. Implementation of that provision has resulted in the presence of veterans' organizations' representatives throughout the VA system, from the central office in Washington to the VA regional offices and medical centers across the United States.[31]

Of at least equal significance in this regard is the power of the Administrator to "authorize an inspection of [VA] records by duly authorized representatives of recognized organizations."[32] 38 U.S.C. § 3301(d). With such authorization, recognized service officers can have access to agency data virtually as though they were employees of the agency. Finally, veterans' organizations are regularly involved in the functioning of the VA, as illustrated by the Congressional mandate that the national service officers of recognized organizations "shall be consulted" in the VA's promulgation of regulations dealing

[31] In addition, the VA's Voluntary Service program, which provides workers who serve without fee in VA medical centers, *see* 38 U.S.C. § 213, is staffed in large measure by volunteers recruited from veterans' organizations and their auxiliaries.

[32] Again as with other authorities and practices discussed, this provision had its antecedents before the 1934 lobbying restriction was enacted. *See* Act of July 7, 1930, c. 849, § 7, 46 Stat. 994.

with the functions of authorized claims representatives. Act of June 22, 1944, c. 268, § 200(b), 58 Stat. 286. Armed with information inevitably obtained by its service officers from such office co-location, from access to agency data and from participation in internal agency decisionmaking, veterans' organizations have noteworthy contributions to make in Congress's efforts, *inter alia*, to provide effective oversight of the VA and its administration of veterans' legislation.

Veterans' organizations have thus occupied, and continue to occupy, a special position in the legislative process. Congress has long called upon these organizations to provide it with information which they uniquely possess and which Congress needs to carry out its functions in this vital area of national policy. It was surely rational for Congress to protect the flow of information between itself and veterans' organizations, and the method Congress selected to achieve this important objective was a rational one. As a coordinate branch of government, its choice in this respect is entitled to great deference.[33] Applying the proper standard, the differential tax treatment should be upheld.[34]

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[33] To the extent that such linedrawing by Congress may be perceived by some as being less than idea, the Court has recognized that " '[p]erfection in making the necessary classifications is neither possible nor necessary.' . . . As long as the classificatory scheme chosen by Congress rationally advances a reasonable and identifiable governmental objective, we must disregard the existence of other methods of allocation that we, as individuals, perhaps would have preferred." *Schweiker v. Wilson*, 450 U.S. 221, 234-235 (1981), quoting *Mass. Bd. of Retirement v. Murgia*, 427 U.S. 307, 314 (1976).

[34] *Amici* assume that, if this Court were to uphold the decision of the Court of Appeals on the merits and were not persuaded to grant the remedy sought by appellee and strike the lobbying retriction in Section 501(c)(3), it would preserve for resolution on remand the appropriateness of granting any other remedy. Such an order would be necessary to permit consideration of important constitutional questions that would be raised by the imposition of any

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals should be reversed.

Respectfully submitted,

JOSEPH C. ZENGERLE *
ZACHARY R. KAROL
BYRON R. TRAUGER
KATHERINE H. WHEATLEY

BINGHAM, DANA & GOULD
1724 Massachusetts Ave., N.W.
Washington, D.C. 20036
(202) 822-9320

Counsel for Disabled American Veterans and Paralyzed Veterans of America

*Counsel of Record

December 16, 1982

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other remedy. For example, in light of appellee's opposition to relief that would adversely affect veterans' organizations, *see Taxation*, J.S. at 76a; Appellee's Jurisdictional Statement on Cross Appeal, at 7 and 9, *amici* would argue that there is no case or controversy herein that would permit a court to grant such relief. *See Williams v. Zbaraz*, 448 U.S. 358, 367 (1980) (holding that a court cannot create a case or controversy over statutory provisions not challenged by plaintiff); *Robinson v. Lorillard Corp.*, 444 F.2d 791, 803 (4th Cir.), *cert. dismissed*, 404 U.S. 1006 (1971) (holding that a remedy desired by no parties should not be forced on them); *Webster Eisenlohr, Inc. v. Kalodner*, 145 F.2d 316, 318 (3rd Cir. 1944), *cert. denied*, 325 U.S. 867 (1945) (holding that judgment cannot be given on a question not raised in litigation between the parties). Even if appellee were to change its position and accept such relief, *amici* would argue that appellee has no standing to seek it. *Duke Power Co. v. Carolina Envtl. Study Group*, 438 U.S. 59, 75 n.20 (1978); *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208 (1974).

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

DONALD T. REGAN, SECRETARY OF THE TREASURY, *et al.*,
Appellants,

v.

TAXATION WITH REPRESENTATION OF WASHINGTON,
Appellee.

On Appeal from the United States Court of Appeals for the District of Columbia Circuit

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AMICUS CURIAE BRIEF OF THE VETERANS OF FOREIGN WARS OF THE UNITED STATES IN SUPPORT OF APPELLANT

Of Counsel:
GEORGE H. GANGWERE
LAWRENCE M. MANER
SWANSON, MIDGLEY, GANGWERE, CLARKE & KITCHIN
1500 Commerce Bank Building
Kansas City, Missouri 64106
WILMER S. SCHANTZ, JR.
6736 Old McLean Village Drive
McLean, Virginia 22101

SHELDON S. COHEN
Counsel of Record
JULIE NOEL GILBERT
DENNIS E. DRAPKIN
COHEN & URITZ
Suite 400
1775 K Street, N.W.
Washington, D.C. 20006
Telephone: (202) 835-7300
Counsel for the Veterans of Foreign Wars of the United States

December 16, 1982

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTIONS PRESENTED

1. Whether the action should be dismissed because the district court lacked jurisdiction over the constitutional issues.

2. Whether appellee's rights to equal protection of the law have been violated by a statutory limitation on its ability to lobby with tax-deductible contributions that does not apply to veterans' organizations.

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iv
INTEREST OF THE VETERANS OF FOREIGN WARS OF THE UNITED STATES	1
SUMMARY OF THE ARGUMENT	2
ARGUMENT	4
I. APPELLEE'S CONSTITUTIONAL CLAIMS EXCEED THE LIMITED STATUTORY GRANT OF JURISDICTION IN A CASE BROUGHT UNDER SECTION 7428	4
II. THE COURT OF APPEALS ERRED IN HOLDING THAT THE STATUTORY SCHEME AT ISSUE VIOLATES THE EQUAL PROTECTION CLAUSE	14
CONCLUSION	23

TABLE OF AUTHORITIES

Cases: Page

AHW Corp. v. Commissioner, 79 T.C. 390 (1982) .. 5
Alexander v. "Americans United" Inc., 416 U.S. 752 (1974) ..... *passim*
Animal Protection Institute, Inc. v. U.S., 78-2 U.S. Tax Cas. (CCH) ¶ 9709 (Ct. Cl. 1978) 11
Big Mama Rag, Inc. v. U.S., 631 F.2d 1030 (D.C. Cir. 1980) 7
Bob Jones University v. Simon, 416 U.S. 725 (1974) 5, 8, 9
California v. Grace Brethren Church, 457 U.S. ——, 102 S.Ct. 2498 (1982) 13
CREATE, Etc., Inc. v. Commissioner, 634 F.2d 803 (5th Cir. 1981) 5
Enochs v. Williams Packing & Navigation Co., Inc., 370 U.S. 1 (1962) 5
Frederick v. U.S., 507 F.2d 1264 (Ct. Cl. 1974) 28
Friends of the Society of Servants of God v. Commissioner, 75 T.C. 209 (1980) 10
Gladstone Foundation v. Commissioner, 77 T.C. 221 (1981) 11
Houston Lawyer Referral Service, Inc. v. Commissioner, 69 T.C. 570 (1978) 10
Johnson v. Robison, 415 U.S. 361 (1974) 7, 8
Louisville & Nashville Ry. v. Mottley, 211 U.S. 149 (1908) 13
Massachusetts v. Feeney, 442 U.S. 256 (1979) 28
Mansfield, Coldwater & Lake Michigan Ry. Co. v. Swan, 111 U.S. 379 (1884) 13
Moore v. City of East Cleveland, 431 U.S. 494 (1977) 7
National Alliance v. U.S., 81-1 U.S. Tax Cas. (CCH) ¶ 9464 (D.D.C. 1981) 5
New Community Sr. Citizen Housing v. Commissioner, 72 T.C. 372 (1979) 5
Oestereich v. Selective Service Board, 393 U.S. 233 (1968) 7
Price Genealogical Ass'n v. IRS, 79-1 U.S. Tax Cas. (CCH) ¶ 9361 (D.D.C. 1979) 7

TABLE OF AUTHORITIES—Continued

	Page
Prince Edward School Foundation v. Commissioner, 478 F. Supp. 107 (D.D.C. 1979), *aff'd per curiam*, (D.C. Cir. unpub'd order, 1981), *cert. denied*, 450 U.S. 944 (1981)	7
Southwest Virginia Professional Standards Review Organization, Inc. v. U.S., 78-2 U.S. Tax Cas. (CCH) ¶ 9747 (D.D.C. 1978)	11, 12
Taxation With Representation of Washington v. Regan, 676 F.2d 715 (D.C. Cir. 1982), *appeal docketed*, 51 U.S.L.W. 3001 (U.S. July 6, 1982) (No. 81-2338)	20, 28, 29
Taxation With Representation v. United States, 585 F.2d 1219 (4th Cir. 1978), *cert. denied*, 441 U.S. 905 (1979)	7, 14
Urantia Foundation v. Commissioner, 684 F.2d 521 (7th Cir. 1982)	5
Weinberger v. Salfi, 422 U.S. 749 (1975)	7
White v. Gates, 253 F.2d 868 (D.C. Cir.), *cert. denied*, 356 U.S. 973 (1958)	28
Statutes and Regulations:	
Act of Aug. 29, 1972, Pub. L. No. 92-418 § 2, 86 Stat. 656	26, 27
Act of June 25, 1948, Judiciary and Judicial Procedure, 28 U.S.C. § 1251 *et seq.* (1976 and Supp. IV 1980):	
28 U.S.C. § 1341	14
28 U.S.C. § 1346(e)	4
28 U.S.C. § 2201	5, 10, 14
Act of May 28, 1936, 36 U.S.C. § 111, *et seq.* (1976 and Supp. IV 1980)	1
36 U.S.C. § 113	25
36 U.S.C. § 114	1
36 U.S.C. § 118	24
Internal Revenue Code of 1954, 26 U.S.C. § 1 *et seq.* (1976 and Supp. V 1982)	2
26 U.S.C. § 162	18

TABLE OF AUTHORITIES—Continued

	Page
26 U.S.C. § 162(e)	17
26 U.S.C. § 162(e)(2)(B)	18
26 U.S.C. § 170	16, 18
26 U.S.C. § 170(c)(1)	16
26 U.S.C. § 170(c)(2)	16, 22
26 U.S.C. § 170(c)(3)	16
26 U.S.C. § 170(c)(4)	16
26 U.S.C. § 170(c)(5)	16
26 U.S.C. § 501	18
26 U.S.C. § 501(c)	16, 17, 18
26 U.S.C. § 501(c)(1)	16
26 U.S.C. § 501(c)(3)	*passim*
26 U.S.C. § 501(c)(4)	16, 18
26 U.S.C. § 501(c)(5)	17
26 U.S.C. § 501(c)(6)	17
26 U.S.C. § 501(c)(8)	16, 17
26 U.S.C. § 501(c)(10)	16, 17
26 U.S.C. § 501(c)(13)	16
26 U.S.C. § 501(c)(17)(A)(i)	17
26 U.S.C. § 501(c)(18)(A)	17
26 U.S.C. § 501(c)(19)	16, 26
26 U.S.C. § 501(c)(21)(B)	17
26 U.S.C. § 501(c)(22)(A)	17
26 U.S.C. § 501(h)	23, 24, 26
26 U.S.C. § 509	18, 21
26 U.S.C. § 509(a)	23
26 U.S.C. § 512(a)(4)	26
26 U.S.C. § 2055	18
26 U.S.C. § 2055(a)(1)	16
26 U.S.C. § 2055(a)(2)	16
26 U.S.C. § 2055(a)(3)	16, 17
26 U.S.C. § 2055(a)(4)	16
26 U.S.C. § 2522	18
26 U.S.C. § 2522(a)(1)	16
26 U.S.C. § 2522(a)(2)	16
26 U.S.C. § 2522(a)(3)	16, 17
26 U.S.C. § 2522(a)(4)	16
26 U.S.C. § 4911	23
26 U.S.C. § 4911(d)(2)(B)	26

TABLE OF AUTHORITIES—Continued

	Page
26 U.S.C. § 4945	18, 21
26 U.S.C. § 7421(a)	5, 14
26 U.S.C. § 7428	*passim*
26 U.S.C. § 7428(a)(1)(A)	6
26 U.S.C. § 7428(b)(2)	11
26 U.S.C. § 7805(a)	6
Revenue Act of 1934, Pub. L. No. 216, 48 Stat. 680 (1934)	18
Tax Reform Act of 1969, Pub. L. No. 91-172, 83 Stat. 487 (1969)	20
Tax Reform Act of 1976, Pub. L. No. 94-455, 90 Stat. 1720 (1976):	
§ 1307	23
26 C.F.R. § 1.0, *et seq.* (1982)	2
26 C.F.R. § 1.170A	16
38 C.F.R. § 1.0, *et seq.* (1982):	
38 C.F.R. § 6.2	28
38 C.F.R. § 8	28
38 C.F.R. § 9.3	28
38 C.F.R. § 11.75-76	28
38 C.F.R. § 17.35	28
38 C.F.R. § 21.40-43	28
38 C.F.R. § 36.4203	28
Congressional Documents:	
H.R. 6712, 80th Cong., 2d Sess. (1948)	17
General Tax Reform: Hearings on the Subject of General Tax Reform Before the House Comm. on Ways and Means, 93d Cong., 1st Sess. (1973)	22
Influencing Legislation by Public Charities: Hearings on H.R. 13500 Before the House Comm. on Ways and Means, 94th Cong., 2d Sess. (1976)	22
Legislative Activity by Certain Types of Exempt Organizations: Hearings Before the House Comm. on Ways and Means, 92d Cong., 2d Sess. (1972)	22

TABLE OF AUTHORITIES—Continued

Page

Panama Canal Treaties: Hearings Before the Senate Comm. on Foreign Relations, 95th Cong., 1st Sess. (1977) 25

Proc. of the 78th Nat. Convention of the Veterans of Foreign Wars of the United States, H.R. Doc. No. 292, 95th Cong., 2d Sess. (1978) 25

Proposals for Administrative Changes in Internal Revenue Service Procedures, Hearings Before the Subcomm. on Oversight of the House Ways and Means Comm., 94th Cong., 1st Sess. (1975) .. 10

The Provision of Federal Benefits for Veterans: An Historical Analysis of Major Veterans' Legislation, 1862-1954 (Comm. Print 171, 1955) 27, 28

H. Rep. No. 658, 94th Cong., 1st Sess. (1975) 9

H. Rep. No. 413 (Part 1), 91st Cong., 1st Sess. (1969) 21

S. Rep. No. 552, 91st Cong., 1st Sess. (1969) 21

S. Rep. No. 1082, 92d Cong., 2d Sess. (1972) 27

S. Rep. No. 558, 73rd Cong., 2d Sess. (1934) 19

S. Rep. No. 938, 94th Cong., 2d Sess. (1976) 9, 10, 11

78 Cong. Rec. (1934):

p. 5861 19

p. 5959 20

p. 7831 20

Rules:

Supreme Court Rules:

Sup. Ct. R. 28.1 1

Federal Rules of Civil Procedure:

Fed. R. Civ. P. 12(h)(3) 13

Tax Court Rules:

Tax Ct. R. 210(b)(11) 13

Tax Ct. R. 213 13

Tax Ct. R. 217(a) 12

TABLE OF AUTHORITIES—Continued

Page

Secondary Authorities:

3 K. Davis, Administrative Law Treatise § 20.04 (1958 and Supp. 1982 § 20.14) 7
4 K. Davis, Administrative Law Treatise § 29.01 (1958 and Supp. 1982) 11
M. Garbis & R. Frome, Procedures in Federal Tax Controversies (1968) 11
Geske, Direct Lobbying Activities of Public Charities, 26 Tax Law. 305 (1972) 23
1 J. Moore, Moore's Fed. Prac. ¶ 0.60[3] (2d ed. 1982) 13
Tax Section Recommendation No. 1974-17, 28 Tax Law. 431 (1975) 11
Troyer, *Charities, Law-Making and the Constitution: The Validity of the Restrictions on Influencing Legislation*, 31 N.Y.U. Inst. on Fed. Tax. 1415 (1973) 22, 27

Miscellaneous:

Advisory Committee Notes to Tax Court Rules 213 and 217(a), 68 T.C. 1025, 1042, 1048 (1977) 12, 13
Jurisdictional Statement, *Regan v. Taxation With Representation of Washington*, 676 F.2d 715 D.C. Cir. 1982), *appeal docketed*, 51 U.S.L.W. 3001 (U.S. July 6, 1982) (No. 81-2338) 2, 24, 25, 28

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

No. 81-2338

DONALD T. REGAN, SECRETARY OF THE TREASURY, *et al.*,
Appellants,

v.

TAXATION WITH REPRESENTATION OF WASHINGTON,
Appellee.

On Appeal from the United States Court of Appeals for the District of Columbia Circuit

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AMICUS CURIAE BRIEF OF THE VETERANS OF FOREIGN WARS OF THE UNITED STATES IN SUPPORT OF APPELLANT

INTEREST OF THE VETERANS OF FOREIGN WARS OF THE UNITED STATES

The Veterans of Foreign Wars of the United States ("VFW") is a federally-chartered veterans' organization.[1] Act of May 28, 1936, ch. 471, § 1, Pub. L. No. 74-630, 49 Stat. 1390. With 1.9 million members, the VFW is one of the largest veterans' organizations in the United States. The VFW engages in a broad range of activities

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[1] In accordance with Sup. Ct. R. 28.1, the VFW, a corporation, states that it has no parent companies, subsidiaries, or affiliates. There are, however, over 10,000 state departments, county councils, districts, and posts throughout the United States. These local units have been established pursuant to 36 U.S.C. § 114, and each includes the words "Veterans of Foreign Wars" in its name. In addition, the VFW has formed a political action committee, known as "VFW-PAC."

on behalf of veterans, including lobbying. The VFW is funded, in part, by tax-deductible contributions.

If the decision of the Court of Appeals is upheld, the interests of the VFW could be directly and adversely affected. The court found that appellee's rights to equal protection of the law were violated by a statutory limitation on its ability to lobby with tax-deductible contributions that does not apply to veterans' organizations such as the VFW. The court remanded the case for a determination of whether the constitutional infirmity should be cured by eliminating the lobbying limitation altogether or by extending that limitation to veterans' organizations. The court recognized that veterans' organizations "would be directly affected" by extension of the lobbying limitation[2] and therefore directed that veterans' organizations be invited to participate on remand in the fashioning of a remedy, although still having no voice whatever in the critical constitutional determination. J.S. App. at 77a.

In a decision of this Court, just as on remand, the status of the VFW under a complex statutory scheme could be altered, perhaps in unintended ways, and the rights accorded to it by the Congress could be abridged. The VFW therefore has a direct and substantial interest in the outcome of this litigation.

SUMMARY OF ARGUMENT

Appellee commenced this action under Section 7428 of the Internal Revenue Code,[3] which provides a limited

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[2] Jurisdictional Statement Appendix at 76a, Taxation With Representation of Washington v. Regan, 676 F.2d 715 (D.C. Cir. 1982), *appeal docketed*, 51 U.S.L.W. 3001 (U.S. July 6, 1982) (No. 81-2338) (hereinafter cited as J.S. App.). The Jurisdictional Statement is hereinafter cited as J.S.

[3] All references to Sections and Regulations herein are to sections of the Internal Revenue Code of 1954, and to the Treasury Regulations promulgated thereunder, as amended to the date of this brief, unless otherwise indicated. 26 U.S.C. § 1, *et seq.* (1976 and Supp. V, 1982); 26 C.F.R. § 1.0, *et seq.* (1982).

exception to the broad Congressional policy barring declaratory and injunctive actions with respect to matters arising under the internal revenue laws. Section 7428, however, authorizes a court only to make a declaration with respect to whether an organization is "described in section 501(c)(3)." Under this narrow grant of authority, a court is not empowered to consider the constitutionality of Section 501(c)(3) itself. This conclusion is consistent with the Congressional intent. Section 7428 was adopted specifically to constrain administrative discretion by providing expedited judicial review of "determinations" by the Commissioner. Because the Commissioner is without power to make a determination with respect to the validity of a tax statute, it is clear that Congress did not intend, by enacting Section 7428, to provide jurisdiction to hear constitutional claims such as those made by appellee. The Court must take cognizance of such a jurisdictional defect, even at this late stage in the proceeding, and reverse the decision of the Court of Appeals.

Apart from the problem of jurisdiction, the opinion of the Court of Appeals utterly fails to reflect the complexity and the deliberateness of the statutory scheme at issue. The specific provision that appellee has challenged is but one of a number of different rules developed by the Congress over many decades affecting the lobbying activities of exempt organizations. The provisions affecting lobbying by charitable organizations, which have undergone several extensive revisions, were enacted in response to well-documented Congressional concern with the use of such organizations to provide tax deductions for lobbying designed to advance the personal interests of contributors. The potential for abuse that Congress identified in the case of charitable organizations is simply lacking in the case of veterans' organizations such as the VFW, whose structure ensures that legislative positions conform to institutional objectives and to the views of a large and diverse membership. Congress has always been well aware of the nature and extent of lobbying

on behalf of veterans, since most of the VFW's legislative appearances are at the invitation of congressional committees. Congress in fact relies upon the major veterans' organizations to assist it in fulfilling its obligations with respect to the nation's veterans. If some restriction on veterans' lobbying were necessary, the legislative opportunity was specifically presented in 1972, when the tax code provisions dealing with the exempt status of veterans' groups were revised. The failure of Congress to impose a limit on the lobbying of veterans' groups, as well as its decision to impose several finely drawn limits on lobbying by charitable organizations, involves precisely the kind of legislative deliberation that will survive an equal protection challenge under any level of scrutiny.

ARGUMENT

I. APPELLEE'S CONSTITUTIONAL CLAIMS EXCEED THE LIMITED STATUTORY GRANT OF JURISDICTION IN A CASE BROUGHT UNDER SECTION 7428

Appellee sought from the Internal Revenue Service a determination that it qualifies for exempt status under Section 501(c)(3) of the Internal Revenue Code. Appellee admitted that it intends to lobby substantially, in plain contravention of the statute, and thus acknowledged that it could not qualify for tax exemption under Section 501(c)(3) unless the lobbying limitation contained in the statute was found to be unconstitutional. The Commissioner correctly determined, in accordance with the scope of his authority, that appellee did not qualify for exempt status under the present Section 501(c)(3). Appellee then commenced this declaratory action in federal district court under Section 7428.[4] Section 7428, however, empowers a court in a case such as this only to declare whether the organization before

[4] Jurisdiction of the district court over actions brought under Section 7428 rests on 28 U.S.C. § 1346(e).

it qualifies "as an organization described in section 501 (c) (3)". A court whose jurisdiction is derived from Section 7428 is, like the Commissioner, without power to consider or to pronounce upon the constitutionality of Section 501(c) (3). Because the decision of the Court of Appeals ventured far beyond the limits of the court's jurisdiction, it must be reversed.

Section 7428 is a narrowly circumscribed exception to the longstanding Congressional policy barring judicial consideration of declaratory and injunctive actions with respect to matters arising under the internal revenue laws. *See* the Anti-Injunction Act, Section 7421(a), and the Declaratory Judgment Act, 28 U.S.C. § 2201; *National Alliance v. U.S.*, 81-1 U.S. Tax Cas. (CCH) ¶ 9464, n.3 (D.D.C. 1981). These rules are vital to the federal revenue system, and assure the Government "of prompt collection of its lawful revenue." *Enochs v. Williams Packing & Navigation Co., Inc.*, 370 U.S. 1, 7 (1962). In view of this broad, overriding policy, exceptions to the Anti-Injunction Act and the Declaratory Judgment Act, including Section 7428, should be narrowly construed, as courts in fact have done. *See, e.g., Urantia Foundation v. Commissioner*, 684 F.2d 521 (7th Cir. 1982); *CREATE, Etc., Inc. v. Commissioner*, 634 F.2d 803 (5th Cir. 1981); *AHW Corp. v. Commissioner*, 79 T.C. 390 (1982); *New Community Sr. Citizen Housing v. Commissioner*, 72 T.C. 372 (1979). Thus, unless appellee's claims fall squarely within the exception created by Section 7428, they are outside the subject matter jurisdiction of the district court. *Bob Jones University v. Simon*, 416 U.S. 725 (1974); *Alexander v. "Americans United" Inc.*, 416 U.S. 752 (1974).[5]

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[5] The narrow exception to Section 7421(a) and 28 U.S.C. § 2201 set forth in *Enochs v. Williams Packing & Navigation Co., Inc.*, is inapplicable to the present case because it is not clear that under no circumstances would the Government ultimately prevail. *Alexander v. "Americans United" Inc.*

Section 7428 provides, in pertinent part:

> (a) Creation of Remedy.—In a case of actual controversy involving—
>
> (1) a determination by the Secretary—
>
> (A) with respect to the initial qualification . . . of an organization as an organization described in section 501(c)(3) . . .
>
> * * * *
>
> upon the filing of an appropriate pleading, [the court] may make a declaration with respect to such initial qualification . . . .

In enacting Section 7428, Congress has done no more than to authorize a court to decide whether a specific set of words and phrases—Section 501(c)(3)—in its present form describes the organization before it. The jurisdictional mandate does not extend to examining the validity of Section 501(c)(3) itself.[6] Since appellee has not sought a declaration with respect to its qualification as an organization "described" by existing Section 501(c)(3), but instead seeks a declaration that a statutory scheme is unconstitutional, appellee's claim is outside the scope of Section 7428.[7]

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[6] This Court has already recognized the distinction between determining whether an organization is described by Section 501(c)(3) and deciding whether Section 501(c)(3) itself is constitutional. In Alexander v. "Americans United" Inc., 416 U.S. 752 (1974), the court below found invalid the lobbying provision of Section 501(c)(3) here at issue. This Court summarized the action of the lower court as follows: "As the court noted, the thrust of respondent's argument is not that it qualifies for a § 501(c)(3) exemption under existing law but rather that that provision's 'substantial part' test and proscription against efforts to influence legislation are unconstitutional." 416 U.S. at 759.

[7] This interpretation is easily reconciled with Section 7428 cases that have considered the constitutionality of the Commissioner's administration of the tax laws. Authority to "prescribe all needful rules and regulations for the enforcement of" the internal revenue laws is delegated to the Commissioner pursuant to Section 7805(a). Questions concerning the correctness of such rules and regulations, including constitutional questions, are thus necessarily

This conclusion is reinforced by the applicable legislative history and the prerequisites for commencing an action under Section 7428. The focus throughout the legislative history and in the procedure established for bringing a Section 7428 action is on providing prompt and effective judicial review of a determination by the Commissioner with respect to, *inter alia*, whether an organization is described by Section 501(c)(3). The Commissioner is without power, however, to determine the constitutionality of a tax statute. As this Court acknowledged in *Johnson v. Robison*, 415 U.S. 361, 368 (1974), "[a]djudication of the constitutionality of congressional enactments has generally been thought beyond the jurisdiction of administrative agencies [citations omitted]," quoting *Oestereich v. Selective Service Board*, 393 U.S. 233, 242 (1968) (Harlan, J., concurring in result). *See Weinberger v. Salfi*, 422 U.S. 749, 765 (1975) (constitutionality of a statutory requirement was "a matter beyond [the Secretary's] jurisdiction to determine"); *Moore v. City of East Cleveland*, 431 U.S. 494, 525 (1977) (Burger, C.J., dissenting); *Alexander v. "Americans United" Inc.*, 416 U.S. 752, 773 (1974) (Blackmun, J., dissenting); 3 K. Davis, Administrative Law Treatise § 20.04 (1958 and Supp. 1982 § 20.14).[8]

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within the authority of the Commissioner, and therefore are within the ambit of Section 7428 "determinations." *See, e.g.*, Big Mama Rag, Inc. v. U.S., 631 F.2d 1030 (D.C. 1980); Prince Edward School Foundation v. Commissioner, 478 F. Supp. 107 (D.D.C. 1979), *aff'd per curiam*, (D.C. Cir. unpub'd order, 1981), *cert. denied*, 450 U.S. 944 (1981); Price Genealogical Ass'n v. IRS, 79-1 U.S. Tax Cas. (CCH) ¶ 9361 (D.D.C. 1979). Until the present case, the constitutionality of a tax statute had not been considered in a case arising under Section 7428.

[8] The Internal Revenue Service apparently shares this view. "In rejecting TWR's 1975 refund claim, the Service stated that the claim was based on the taxpayer's view that the statute was unconstitutional and observed that '[o]nly the courts have authority to pass on such matters.'" Taxation With Representation v. United States, 585 F.2d 1219, 1223 (4th Cir. 1978), *cert. denied*, 441 U.S. 905 (1979).

Because the Commissioner is without power to make a determination with respect to the constitutionality of a tax statute, and because Section 7428 was intended to provide judicial review of determinations made by the Commissioner, the constitutionality of a tax statute may not properly be brought before a court in a Section 7428 case.

This reading of Section 7428 is buttressed by the Court's analysis of a closely related question of statutory interpretation in *Johnson v. Robison*, 415 U.S. 361 (1974). There, the issue was whether a statute that precluded judicial review of a "decision of the Administrator" prevented review of the validity of the statute. The Court noted the inherent lack of power of an administrative agency to determine the validity of federal statutes, and therefore held that the statutory bar to review of a "decision of the Administrator" did not encompass a "decision of *Congress* to create a statutory class entitled to benefits . . . ." 415 U.S. at 367 (emphasis original). Applying *Johnson v. Robison* to the case now before the Court, it is clear that since Section 7428 only provides review of a "determination by the Secretary" as to whether an organization is described by Section 501(c)(3), it does not provide review of the "decision of Congress" defining the class eligible for Section 501 (c)(3) benefits.

The legislative history of Section 7428 demonstrates that Congress intended only to provide judicial review of matters within the Commissioner's discretion. Section 7428 was adopted in 1976 in response to urging by this Court that Congress provide a mechanism for meaningful judicial review of the Commissioner's broad discretionary powers over not-for-profit organizations. In *Bob Jones University v. Simon*, 416 U.S. 725 (1974), and *Alexander v. "Americans United" Inc.*, 416 U.S. 752 (1974), the Court held that the Internal Revenue Service could not be restrained through a declaratory judgment proceeding

from withdrawing administrative recognition of tax-exempt status. Tax-exempt organizations and their donors were therefore relegated to an action to redetermine a tax deficiency or an action to determine eligibility for a tax refund in order to establish qualification for tax exemption. The Court expressed its dissatisfaction with this result and recommended legislative revision:

> . . . * * * The degree of bureaucratic control that, practically speaking, has been placed in the Service over those in petitioner's position is susceptible to abuse, regardless of how conscientiously the Service may attempt to carry out its responsibilities. Specific treatment of not-for-profit organizations to allow them to seek preenforcement review may well merit consideration. But this matter is for Congress . . . .

Bob Jones University, 416 U.S. at 749-750.[9] Thus, the Court perceived the problem as one requiring procedural relief from arbitrary determinations of the Internal Revenue Service, and not as one requiring the expansion of remedies to provide plenary review of the validity of the statute itself.

Both the Senate and House reports on the legislation that became Section 7428 specifically refer to the Court's expression of concern in these cases about the potential abuses of administrative discretion in the exempt organization area.[10] It is apparent in these reports that

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[9] The only dissenting justice in the two cases expressed similar views. Alexander v. "Americans United" Inc., 416 U.S. at 774-775 (Blackmun, J., dissenting).

[10] H. Rep. No. 658, 94th Cong., 1st Sess. 284 (1975), *reprinted in* [1976] U.S. Code Cong. & Ad. News 2897, 3180; S. Rep. No. 938, 94th Cong., 2d Sess. 586 (1976) *reprinted in* [1976] U.S. Code Cong. & Ad. News 3439, 4010 (hereinafter cited as S. Rep. No. 938). The precise issue before the Court in both cases involved the administrative revocation of previously-granted tax-exempt status, but it is clear that Congress regarded the admonitions of the Court and the impact of its decisions as applying with equal force to the initial request for tax-exempt status. S. Rep. No. 938 at 586-587.

the intent of the Congress was only to mitigate the force of the Commissioner's administrative power by allowing expedited review of his administrative determinations.[11] Thus, Congress provided jurisdiction only for declarations with respect to "determinations" of the Commissioner, and rejected the type of expansive jurisdiction found, for example, in the Declaratory Judgment Act, 28 U.S.C. § 2201.[12]

The courts have recognized that Congress' purpose in enacting Section 7428 was "to provide nonprofit organizations claiming tax-exempt or non-private foundation status with an avenue for prompt judicial relief from erroneous or arbitrary determinations by the Internal Revenue Service." *Friends of the Society of Servants of God v. Commissioner*, 75 T.C. 209, 215 (1980). "[T]he focus of [Section 7428] is on the review of the Service's administrative determination . . . . The action is called a declaratory judgment, but it has much narrower scope than exists in respect of declaratory judgment litigation in the United States District Courts generally". *Houston Lawyer Referral Service Inc. v. Commissioner*, 69 T.C. 570, 573 (1978).

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[11] The Senate report, for example, notes that a declaratory judgment procedure is needed "[i]n order to provide an effective appeal from an Internal Revenue Service determination that an organization is not exempt from tax. . . ." S. Rep. No. 938 at 587.

[12] During legislative consideration of this issue, at least one witness argued that a declaratory judgment provision for exempt organizations should permit resolution of the validity of statutory provisions. See *Proposals for Administrative Changes in Internal Revenue Service Procedures, Hearings Before the Subcomm. on Oversight of the House Ways and Means Comm.*, 94th Cong., 1st Sess. (1975) at 124-125 (testimony of Alan Morrison). The constitutionality of a statute was in fact at issue in the *"Americans United"* case, where the Court found that jurisdiction was lacking. Although Congress did consider the issue of administrative discretion presented by *"Americans United,"* there is no indication in the legislative history that Congress intended to provide review of the specific subject matter of that case, and far broader language would have been required in the statute to do so.

The concern of Congress with the administrative determination is reflected in the requirement of Section 7428 (b)(2) that organizations seeking relief under Section 7428 must first exhaust all administrative remedies. "To exhaust its administrative remedies, the organization must satisfy all appropriate procedural requirements of the Service", such as supplying "the necessary information on which to make a determination." S. Rep. No. 938 at 590. "[T]he purpose of the exhaustion of administrative remedies requirement was to provide the Court with a full and complete administrative record on which to base its decision." *Gladstone Foundation v. Commissioner*, 77 T.C. 221, 232-233 (1981). "Absent such a requirement, an organization might be tempted to avoid pressing its request for a determination as to its status, on the assumption that it will receive more favorable treatment in court." Tax Section Recommendation No. 1974-17, 28 Tax Law. 431, 435 (1975).[13] The Tax Court has in fact fashioned its rules for proceedings under Section 7428 in order to make meaningful the exhaustion of administrative remedies requirement.[14] Thus, for example, although the standard of review under Section 7428 is *de novo*, its scope is limited to the administrative record. *Southwest Virginia Professional Standards Review Organization, Inc. v. United States.*

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[13] By contrast, exhaustion of administrative remedies is *not* a jurisdictional prerequisite to obtain judicial review pursuant to a tax deficiency or tax refund action. *See, e.g.*, M. Garbis and R. Frome, Procedures in Federal Tax Controversies 3.2, 10.2 (1968). Judicial review of a typical tax case results in almost complete substitution of judgment on all questions. 4 K. Davis, Administrative Law Treatise § 29.01, p. 114 n.1 (1958 and Supp. 1982).

[14] At the urging of Congress, S. Rep. No. 938 at 588, the Tax Court rules for Section 7428 cases have been adopted by the other courts with jurisdiction over such cases. Southwest Virginia Professional Standards Review Organization, Inc. v. United States, 78-2 U.S. Tax Cas. (CCH) ¶ 9747 (D.D.C. 1978); Animal Protection Institute, Inc. v. United States, 78-2 U.S. Tax Cas. (CCH) ¶ 9709 (Ct. Cl. 1978).

"To decide otherwise would enable plaintiffs to circumvent the Section 7428(b)(2) requirement that applicants exhaust their administrative remedies. [footnote omitted]." *Id.* at 85,519.[15]

The limited scope of judicial review under Section 7428, which was not raised at any earlier point in this litigation, thus follows from a straightforward analysis of the statute and its legislative history. This limitation on the grant of jurisdiction as reflected in the statute and in court rules implementing the statute has very practical consequences. Because the Commissioner is bound by the governing statutes, and therefore cannot make the necessary record with respect to constitutional issues, and because the trial-level court is precluded from considering legal issues and facts that the Commissioner himself could not consider in the administrative proceeding, Section 7428 is unsuited to the task of coping with constitutional challenges to tax statutes. The problems that would inevitably follow from misuse of Section 7428 are vividly illustrated by the case now before the Court.

In the administrative proceeding, the Commissioner properly made no attempt to establish a record to refute the constitutional challenges made by appellee. Indeed, the Tax Court rules, which apply to all Section 7428

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[15] Under Tax Court Rule 217(a), judicial review is "ordinarily" limited to the administrative record unless good cause is shown, or a revocation is involved. The Advisory Committee Note to Rule 217(a) states that the possibility of going outside the administrative record appears "merely out of an abundance of caution" and that "there does not appear to be at this time any circumstances under which a trial will be held except as to disputed jurisdictional facts or to resolve disagreement between the parties as to the contents of the administrative record." 68 T.C. 1025, 1048 (1977). The exception for revocations is premised on the fact that normally in such cases, the administrative record is independently established by the Internal Revenue Service, rather than by accepting facts asserted by the applicant.

cases,[16] do not contemplate the submission of evidence by the Commissioner, Tax Ct. R. 210(b)(11) (scope of administrative record), and generally require the Commissioner to accept the facts pleaded by the petitioner without investigating them, Tax Ct. R. 213; Advisory Comm. Note to Rule 213, 68 T.C. 1025, 1042 (1977). A defense of the constitutionality of the challenged provisions therefore did not commence until the judicial stages of this proceeding. "Evidence" supporting the preferential treatment of veterans' organizations among tax-exempt entities was furnished by appellant's briefs and adduced by extensive judicial fact finding. Contrary "evidence" was introduced by appellee's briefs. The result is that this Court has been presented with a wholly inadequate record on which to decide whether the challenged statutory provisions violate appellee's rights to equal protection of the law. Inadequacy of the record for purposes of constitutional determinations is inherent in the procedures adopted for cases brought under Section 7428.

The jurisdictional defect in appellee's claims cannot be cured in this case or waived by an appellate court. "[F]ederal courts have only that jurisdiction which Congress, acting within the limits of the Constitution, confers upon them." 1 J. Moore, *Moore's Federal Practice* ¶0.60[3] (2d ed. 1982). The absence of subject matter jurisdiction is not waivable by the parties, and may be raised by courts, including this Court, on their own motion. The cause must be ordered dismissed upon a finding that the court lacks jurisdiction. *Mansfield, Coldwater & Lake Michigan Ry. Co. v. Swan*, 111 U.S. 379 (1884); *Louisville & Nashville Ry. v. Mottley*, 211 U.S. 149 (1908); *see also* Fed. R. Civ. P. 12(h)(3).

California v. Grace Brethren Church, 457 U.S. ——, 102 S. Ct. 2498 (1982), demonstrates the consequences of a finding that the Court lacks jurisdiction. There,

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[16] *See* note 14, *supra*.

despite the federal defendants' request that the Court resolve the constitutional question, the Court declined to hear First Amendment claims after determining that the district court lacked jurisdiction by reason of the Tax Injunction Act, 28 U.S.C. § 1341. Similarly, in *Alexander v. "Americans United" Inc.*, 416 U.S. 752 (1974), the Court refused to hear constitutional challenges to Section 501(c)(3) in an action that the Court found was outside the subject matter jurisdiction of the district court by reason of the Declaratory Judgment Act, 28 U.S.C. § 2201, and the Anti-Injunction Act, Section 7421(a). Accordingly, the Court should now decline to hear appellee's constitutional claims because Section 7428, as applied to such claims, does not override the general bar to declaratory actions in federal tax matters imposed by the Anti-Injunction Act and the Declaratory Judgment Act.

Finally, it should be noted that if the Court decides that the constitutional claims here at issue fall outside the scope of Section 7428, organizations such as appellee are not without a remedy. The tax deficiency and tax refund routes are still available to test those claims. *See, e.g., Taxation With Representation v. United States*, 585 F.2d 1219 (4th Cir. 1978), *cert. denied*, 441 U.S. 905 (1979), in which the same constitutional challenges that found favor before the Court of Appeals in this litigation were decided adversely to appellee's predecessor in interest in a tax refund action.

II. THE COURT OF APPEALS ERRED IN HOLDING THAT THE STATUTORY SCHEME AT ISSUE VIOLATES THE EQUAL PROTECTION CLAUSE

The Court of Appeals found that appellee's rights to equal protection were violated by the provisions of the Internal Revenue Code that impose upon the lobbying of organizations exempt from tax under Section 501(c)(3) a limitation that is not imposed on the lobbying of veterans' groups. In so holding, the court looked to the

lobbying limitation in Section 501(c)(3) as if it were simply an additional restriction imposed without adequate reason upon one among several otherwise comparable statutory classes. The history of the lobbying provisions demonstrates, however, that a number of statutory distinctions, of which appellee has challenged but one, were deliberately drawn over many decades in response to specific Congressional concerns with lobbying by charitable organizations. This statutory scheme, involving deliberate distinctions finely drawn among organizations that are dissimilar in critical respects, will survive an equal protection challenge under any level of scrutiny.[17]

The concerns with lobbying by exempt entities that the Congress identified have no application to veterans' organizations such as the VFW. In looking to the lobbying of charitable organizations, Congress saw a broad range of purposes and activities, an absence of accountability, and a potential for significant abuse. By contrast, major veterans' organizations, which are Congressionally chartered and which submit annual reports on their finances and procedures to Congress, pursue legislative objectives that are consistent with their charter mandates and that are adopted by vote of a broad-based membership. Such organizations carry out a responsibility to the nation and to its veterans of providing Congress with the information and advice necessary to oversee and maintain a variety of veterans' programs. For veterans' groups, informing the legislature is a function that Congress has sanctioned and that it encourages by frequent requests for testimony and assistance.

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[17] The VFW endorses the position set out in appellant's Jurisdictional Statement that the standard of review to be applied in determining the constitutionality of the distinctions at issue is whether such distinctions are rationally related to the achievement of a legitimate governmental purpose. The history of Congressional deliberation and action in this area is such, however, that the statutory distinctions could also withstand a higher level of scrutiny.

The Court of Appeals' decision must be viewed in the proper legislative context. Section 501(c) confers tax-exempt status on twenty-two separate classes of organizations. In addition to charitable organizations and veterans' groups, exempt status is accorded to entities such as business leagues, social clubs, cemetery companies, credit unions, black lung trusts, horticultural organizations, and other groups of varied character and constituencies. Of the various classes of exempt organizations, six are qualified recipients of deductible contributions under the provisions of Section 170.[18] The extent to which contributions may actually be deducted for income tax purposes, however, varies among these classes of organizations and in some cases among organizations within a single exempt category, and special rules apply to limit deductions for certain kinds of contributions.[19] In addition, contributions to certain of these organizations are deductible only if the funds are devoted to specific purposes.[20]

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[18] Sections 170(c)(1)-(5) allow deductions for contributions to instrumentalities of the United States exempt under Section 501(c)(1), charitable or educational organizations exempt under Section 501(c)(3), fraternal beneficiary societies exempt under Section 501(c)(8), fraternal societies operating under the lodge system exempt under Section 501(c)(10), cemetery companies exempt under Section 501(c)(13), and veterans' organizations, which can be exempt under Section 501(c)(19), Section 501(c)(4), or Section 501(c)(8). Of the six classes of organizations that qualify for income tax purposes as recipients of deductible contributions, five may receive contributions that are deductible for estate and gift tax purposes. Sections 2055(a)(1)-(4) and 2522(a)(1)-(4). Deductions are not permitted for gifts or bequests to cemetery companies exempt under Section 501(c)(13).

[19] Section 170 and Treasury Regulations § 1.170A.

[20] *See, e.g.*, Section 170(c)(4), which provides that contributions to fraternal societies operating under the lodge system are deductible only if used exclusively for religious, charitable, scientific, literary, or educational purposes. In several cases, for estate tax and gift tax purposes, deductibility is limited to amounts that are

A number of distinctions, including those appellee has addressed, are made with respect to the lobbying activities of exempt organizations. For federal estate tax purposes, bequests to a fraternal beneficiary society exempt from tax under Section 501(c)(8) or Section 501(c)(10) are deductible only if the society "would not be disqualified for tax exemption under section 501(c)(3) by reason of attempting to influence legislation." Section 2055(a)(3).[21] A number of organizations exempt under Section 501(c) are not expressly prohibited from engaging in lobbying activities, but are indirectly denied the right to use funds for legislative purposes.[22] Labor and agricultural organizations exempt under Section 501(c)(5) and trade associations and chambers of commerce exempt under Section 501(c)(6) can fund certain of their legislative activities with dues or contributions that are deductible to members under Section 162(e), but deduc-

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used to fund specified activities. For example, under Section 2522(a)(3), a gift tax deduction is allowed for gifts to fraternal societies operating under the lodge system only if such gifts are to be used exclusively for religious, charitable, scientific, literary or educational purposes, defined specifically as "including the encouragement of art".

[21] A provision designed to add a lobbying restriction comparable to that found in Section 501(c)(3) to the income tax exemption and deduction provisions relating to fraternal beneficiary societies passed the House in 1948, but was never enacted. H.R. 6712, 80th Cong. 2d Sess. § 113(b)(2) (1948).

[22] *See, e.g.*, Section 501(c)(17)(A)(i) (which prohibits the income or corpus of a supplemental unemployment benefit trust to be used for any purpose other than for providing supplemental unemployment compensation benefits); Section 501(c)(18)(A) (which precludes exempt treatment for employee funded pension trusts if the funds contributed are not used solely for the provision of benefits under a pension plan); Section 501(c)(21)(B) (which prohibits funds of a black lung trust to be used for any purposes other than those specified); and Section 501(c)(22)(A) (which sets forth the exclusive purposes for which the sponsors of a multi-employer plan may establish a trust).

tions are denied under Section 162(e)(2)(B) for contributions used to carry on certain kinds of grass roots lobbying. Finally, private foundations, a sub-class of Section 501(c)(3) organizations, are virtually prohibited from engaging in any lobbying whatsoever. Sections 509 and 4945.

The intricacies and the interrelationships of the provisions relating to tax exemption and to deductibility that are set out in Sections 162, 170, 501, 509, 2055, 2522, and 4945 make it very clear that Congress has always regarded different classes of exempt organizations as distinct in their character and functions. Congress has acted repeatedly and deliberately to apply to these various organizations the specific rules and limitations that it has deemed appropriate. The distinctions with respect to lobbying that Congress has created are part of this broader pattern, and reflect the kind of deliberation that is peculiarly the province of the legislature.

From the web of rules affecting exempt organizations, appellee has focused its claim on Section 170, which governs the deductibility of contributions, rather than on Section 501(c), which controls exempt status.[23] Deductibility of contributions has indeed been the heart of the lobbying issue since 1934, when the first limit on lobbying by exempt organizations was enacted.[24] The Senate Report for the Revenue Act of 1934 indicates that Congress regarded the lobbying limitation imposed as a condition to the deductibility of contributions as the crucial statutory revision, and viewed as merely a conforming

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[23] An organization that intends to carry on lobbying as a primary activity can qualify for exempt status under Section 501(c)(4), which provides, with some minor exceptions, virtually all of the benefits of exemption available under Section 501(c)(3). Organizations exempt under Section 501(c)(4), however, do not qualify as recipients of deductible contributions under Section 170.

[24] 48 Stat. 690, 700, 755, 760 (1934).

amendment the addition of a lobbying limitation to the rules governing exempt status.[25]

The 1934 legislation raised several key issues concerning lobbying by exempt organizations that have resurfaced repeatedly. The specific impetus for the 1934 amendment was the ability of a few contributors to use an exempt organization as a vehicle to deduct the costs of lobbying that they would otherwise have funded on a personal nondeductible basis. As Senator Reed stated during floor debate on the amendments, "[t]here is no reason in the world why a contribution . . . should be deductible as if it were a charitable contribution if it is a selfish one made to advance the personal interests of the giver of the money. That is what the committee was trying to reach . . . ." 78 Cong. Rec. 5861 (1934). Several senators involved in the debate pointed out that the amendment as drawn would affect not only organizations representing narrow or selfish interests, but also "worthy institutions" such as the Society for the Prevention of Cruelty to Children. Senator Reed called attention specifically to "the case of those who are urging the adoption of the child-labor amendment. Certainly they are not acting from selfish motives, and yet almost their entire activity is an effort to influence legislation." *Id.* Certain senators also questioned whether the lobbying limitation should extend to all exempt organizations. Senator Harrison noted that the amendment relating to deductibility of contributions to charitable organizations would not apply to other organizations, such as "war organizations," and suggested that this restriction should be reconsidered by the conferees. *Id.*[26]

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[25] S. Rep. No. 558, 73rd Cong., 2d Sess. 26, 30 (1934).

[26] The Congress would have been well aware in 1934 of the nature and scope of veterans' lobbying activities. The VFW, for example, had been actively involved in the legislative proceedings which led to enactment of the War Risk Insurance Act of 1917, the first vocational training legislation for disabled veterans in 1918, the first

Despite these expressions of concern, the Senate declined to take action either to extend the lobbying limitation to war organizations or to exempt publicly-supported groups. Instead, the Senate agreed to send the provision to conference, where the language could be changed "if it is found to do any inequity". *Id.* at 5959. The conference committee subsequently considered and modified the lobbying provision. *Id.* at 7831. The final version of the amendment, however, remained limited to Section 501 (c) (3) organizations, and failed to distinguish between publicly-supported organizations and those that merely advance the "selfish" motives of their contributors.[27]

The questions raised during the 1934 Senate debate about the "worthy institutions" that were of necessity subjected to the same restrictions as those applied to "selfish" entities reflected a problem in the treatment of charities that was not resolved until 1969. Prior to enactment of the Tax Reform Act of 1969,[28] no substantial statutory distinction was drawn between private foundations and public charities, both of which are exempt from tax under Section 501(c)(3). The same provisions thus governed the deduction of contributions not only to publicly-controlled and publicly-supported organi-

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pension bill for Spanish-American war veterans in 1920, the World War Veterans Act in 1924, and the first bill granting pensions to the widows and children of veterans regardless of service connection in 1934.

[27] Adoption of the amendment in this form, after the Senate had called the attention of the conference committee to the precise scope and effect of the provision, can only be construed as a formal approval and adoption of the statutory lines that the Senate had drawn. The Court of Appeals was plainly in error in suggesting that Congress had acted inadvertently in 1934. Taxation With Representation of Washington v. Regan, 676 F.2d 715, 735, 744 (D.C. Cir. 1982), *appeal docketed*, 51 U.S.L.W. 3001 (U.S. July 6, 1982) (No. 81-2338).

[28] Tax Reform Act of 1969, Pub. L. No. 91-172, 83 Stat. 487 (1969).

zations, but also to foundations that were both funded by and controlled by a few individuals. Subject only to the general lobbying limitation enacted in 1934, such individuals could direct the lobbying activities of their foundations on a wide range of issues, including issues of specific concern to themselves or issues on which they held views not widely accepted, and could do so on a tax-subsidized basis.

The problem of foundation lobbying was the subject of very extensive study and Congressional debate over a period of many years. Finally, in 1969, Congress concluded that the legislative restriction enacted in 1934 was not a sufficient restraint upon organizations not subject to the internal controls that follow from public support.[29] The private foundation provisions that were enacted thus contained a new and much stricter lobbying limitation. If an organization can qualify for exemption only as a private foundation,[30] it is subject to excise taxes under Section 4945 on "taxable expenditures", including expenditures to influence legislation. The lobbying of a private foundation is subject to a tax equal to 100 percent of lobbying expenditures if such expenditures are not "corrected" within a specified period, along with further excise taxes where lobbying expenditures are repeated. Foundation managers who agree to the making of expenditures to influence legislation may also be subject to individual excise taxes. The excise taxes imposed upon private foundations and their managers with respect

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[29] S. Rep. No. 552, 91st Cong., 1st Sess. 47 (1969), *reprinted in* [1969] U.S. Code Cong. & Ad. News 2027, 2074-2075; H. Rep. No. 413 (Part 1), 91st Cong., 1st Sess. 32 (1969), *reprinted in* [1969] U.S. Code Cong. & Ad. News 1645, 1676-1677.

[30] Under Section 509, the term "private foundation" is defined to include any organization that qualifies for exempt status under Section 501(c)(3), unless the organization can demonstrate the requisite degree of public support and public involvement.

to attempts to influence legislation have the practical effect of a prohibition on foundation lobbying.[31]

This concern, then, with private-purpose lobbying was the basis both for the 1934 legislation adding a lobbying limit to what are now Sections 170(c)(2) and 501(c)(3), and for the 1969 legislation that subjected the new category of private foundations to a virtual lobbying prohibition. Although the private foundation provisions effectively put an end to the worst cases of tax-subsidized lobbying by privately-controlled groups, enactment of the 1969 legislation did not end the concern of the Congress with the tax treatment of charities, or with the specific issue of lobbying.[32] Particular criticism was directed at the vagueness of the "substantial part" test of Section 501(c)(3),[33] which in some cases was said to have such a chilling effect that charities avoided lobbying entirely. Proposals for change focused upon ways to reduce the uncertainties of application inherent in the formulation of the Section 501(c)(3) lobbying limit and to increase

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[31] It has been suggested that "private foundations are the only class of institutions in the United States which the Federal Government attempts directly and entirely to prevent from stating views on legislative issues". Troyer, *Charities, Law-Making, and the Constitution: The Validity of the Restrictions on Influencing Legislation*, 31 NYU Inst. on Fed. Tax. 1415, 1464-65 (1973).

[32] *See, e.g.*, Legislative Activity by Certain Types of Exempt Organizations: Hearings Before the House Comm. on Ways and Means, 92d Cong., 2d Sess. (1972); General Tax Reform: Hearings on the Subject of General Tax Reform Before the House Comm. on Ways and Means, 93d Cong., 1st Sess., Parts 4, 15 (1973); Influencing Legislation by Public Charities: Hearings on H.R. 13500 Before the House Comm. on Ways and Means, 94th Cong., 2d Sess. (1976). During this period, numerous bills were introduced relating to the lobbying activities of charities.

[33] *See, e.g.*, Legislative Activity by Certain Types of Exempt Organizations: Hearings Before the House Committee on Ways and Means, 92d Cong. 2d Sess. 32-33 (1972) (statement of Mortimer M. Caplin).

the actual lobbying allowance for public charities.[34] There was, however, even after the 1969 amendments, a perceived need to maintain some restrictions on the ability of public charities to serve as vehicles for the deduction of lobbying expenditures.[35]

Congress responded to these concerns in 1976 with legislation designed to accommodate the need of public charities for specificity and certainty, while maintaining a meaningful but measured limitation on the use of tax-subsidized funds for lobbying. Under the new Section 501(h),[36] organizations described in Section 501(c)(3) can elect to have their lobbying expenditures subjected to precise quantitative limitations, set by reference to overall expenditures. For organizations that exceed their limits, the result is not loss of exemption but a tax on excess lobbying expenditures. The Section 501(h) election allows large publicly-supported charities to do quite extensive lobbying, while smaller charities can do less, and can only lobby if they are prepared to undertake a substantial program of other charitable activities.

Appellee may argue that in working out this statutory scheme Congress incorrectly balanced the interests at stake, but it surely cannot maintain that Congress acted

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[34] Geske, Direct Lobbying Activities of Public Charities, 26 *Tax Law.* 305 (1972).

[35] Under the provisions of Section 509(a), an organization can avoid classification as a private foundation if it derives more than one-third of its support over a four-year period from permitted public sources. After 1969, therefore, an organization could continue to derive a majority of its support from a few individuals, without becoming subject to the private foundation lobbying limitations.

[36] Section 501(h) and its companion Section 4911 were added to the Internal Revenue Code by section 1307 of the Tax Reform Act of 1976, Pub. L. No. 94-455, 90 Stat. 1720 (1976).

inadvertently.[37] Nor can it argue that Congress was without basis in drawing distinctions between the lobbying of charities and that of veterans' organizations. The element of private control and the potential for use of exempt organizations to generate deductions for private-purpose lobbying is simply lacking in the context of veterans' groups. Just as Congress could reasonably determine that public charities are less subject to lobbying abuses than private foundations and that significantly different lobbying limits should accordingly be applied, so it could determine that by their very nature veterans' groups are less susceptible to private control than public charities, and that accordingly no specific lobbying restriction is necessary.

Both the membership and the organizational structure of veterans' organizations assure that only broad public interests are represented, and that there is a true consensus within a large public body before any legislative positions are advocated. The VFW, for example, has a membership of approximately 1,900,000, cutting across lines of race, politics, geography, and wealth. Its purposes are set forth in a federal charter and its institutional programs are adopted at a national convention, the proceedings of which are required by statute to be reported to Congress. 36 U.S.C. § 118 (1976). Legislative positions of the VFW are adopted pursuant to an elaborate administrative framework, which functions to filter out proposals or issues that are of concern to less than a majority of the membership, or that are not consistent with the VFW's charter objectives. This institutional control over legislative activities does in fact operate to limit the VFW's lobbying to issues that are well within its charter mandate.

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[37] Appellee itself has declined to make an election under Section 501(h). J.S. App. at 105a. By its own refusal to accept the form of legislative relief that Congress has fashioned, however, appellee cannot diminish the significance of Congress' deliberative process, or subject Congress' determination to judicial legislating.

During the two-year period beginning on June 17, 1980, the VFW authorized 83 appearances before Congressional committees, 76 (92 percent) of which were at the invitation of the committee and *all* of which were related to veterans' affairs.[38]

Because such an overwhelming percentage of the VFW's legislative appearances are by invitation of the Congress, it is particularly ironic for the Court of Appeals to contemplate a judicial limitation on veterans' lobbying as a remedy for a Congressionally-created statutory distinction. Veterans' organizations perform an essential intermediary role in the relationship between veterans and the federal government. The VFW represents veterans before the Veterans Administration and before military boards, and occupies government office space for that purpose. Through its myriad state and local units the VFW is in constant touch with veterans throughout the nation. In view of this extensive continuing contact between the VFW and veterans, and the

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[38] Apparently because of the insufficiency of the record below, the Court of Appeals made several assertions with respect to the lobbying efforts of the VFW that are incorrect or misleading. The court, for example, cited as an instance of lobbying outside the scope of veterans' concerns certain appearances by the VFW in connection with the proposed Panama Canal treaties. In fact, the VFW was *invited* to appear before the Senate Committee on Foreign Relations in regard to the proposed treaties. *See Panama Canal Treaties: Hearings Before the Senate Comm. on Foreign Relations*, 95th Cong., 1st Sess. 566 (1977) (statement of Col. Phelps Jones), *cited in* J.S. App. at 72a, n.49. Consequently, the VFW asked to testify at the House Committee hearing on the same subject. The VFW's testimony was given under the authority of a resolution unanimously adopted at its national convention. *See Proc. of the 78th Nat. Convention of the Veterans of Foreign Wars of the United States*, H.R. Doc. No. 292, 95th Cong., 2d Sess. 25, 66 (1978). Concern with matters of national security such as the Panama Canal is well within the VFW's charter mandate "to maintain and extend the institutions of American Freedom, and to preserve and defend the United States from all her enemies, whomsoever." 36 U.S.C. § 113 (1976).

complexity and number of veterans' programs, Congress expects and requests the VFW to advise it on all matters relating to veterans' affairs.[39]

Since the Congress receives annual reports from the VFW and since it initiates most of the VFW's legislative appearances, it is certainly well aware, as it has been since 1934, of the extent and nature of VFW lobbying. Had there been a concern with abuses of veterans' lobbying comparable to the concern with lobbying by private foundations and public charities, Congress had the perfect opportunity to address the issue. In 1972, a few years after enactment of the private foundation lobbying restrictions and in the midst of the review that led to the enactment of Section 501(h), Congress reconsidered and substantially revised the statutory provisions governing the taxation of veterans' organizations. The Act of August 29, 1972[40] added to the Internal Revenue Code Section 501(c)(19), which functions specifically to exempt from tax the income of qualified veterans' groups, and Section 512(a)(4), which provides a special exception from the unrelated business income tax for income derived by Section 501(c)(19) organizations from providing insurance benefits for members and dependents. The Senate Finance Committee noted that Section 512(a)(4) excludes insurance income from the unrelated business income tax only to the extent that such income is set aside "for the purpose of either providing for the payment of insurance benefits or for religious, charitable, scientific, literary, educational, etc. purposes", and added

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[39] It might be noted that a very substantial portion of the VFW's lobbying costs, which are incurred in testifying before the Congress at the request of the committees, would appear not to constitute "lobbying expenditures" under the Internal Revenue Code. *See* Sections 4911(d)(2)(B) and 501(h).

[40] Pub. L. No. 92-418 § 2, 92d Cong. 2d Sess., 86 Stat. 656.

that "the committee does not intend for any expenditures for lobbying purposes to come under this exemption."[41]

Although the practical effect of the Finance Committee's comment could be questioned,[42] it demonstrates unequivocally that in the course of reconsidering the exempt status of veterans' groups, Congress gave specific consideration to the tax consequences of veterans' lobbying. This was the natural occasion for imposing any limits or conditions on lobbying that might be deemed necessary, yet it produced only the Finance Committee's very measured response. The exemption and unrelated business income tax provisions of the Act of August 29, 1972, coming roughly in the middle of a decade of intensive legislative consideration of exempt organization lobbying, effectively dispel any notion that Congressional action in this area was other than quite deliberate and conscious. Such deliberate legislative distinctions drawn in response to perceived differences among classes of tax-exempt organizations must be sustained against an equal protection challenge.

The tax code's special classification of veterans' groups draws additional constitutional support from the repeated judicial approval of legislation designed specifically to aid veterans. Legislative preference for veterans dates back to colonial times.[43] Veterans' preferences reflect the sense of the Congress that "those who are selected from among us to wear the uniform and to serve the country on the firing line are certainly entitled, when peace has been won through their efforts, to be

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[41] S. Rep. No. 1082, 92d Cong. 2d Sess. 5 (1972), *reprinted in* [1972] U.S. Code Cong. & Ad. News 3141, 3145.

[42] Troyer, *supra*, n.31 at 1415, 1422-1425.

[43] Staff of House Comm. on Veterans' Affairs, 84th Cong., 1st Sess., The Provision of Federal Benefits for Veterans: An Historical Analysis of Major Veterans' Legislation, 1862-1954 (Comm. Print 171, 1955).

selected and given special consideration and preference in employment by their Government in peacetimes."[44] Under present law veterans are eligible not only for significant preferences in both federal and state government employment, but for special life insurance, 38 C.F.R. §§ 6.2, 8, 9.3; special loans, *id.* §§ 11.75-76; special medical and health care services, *id.* §§ 17.35; special assistance in vocational rehabilitation and educational pursuits, including allowances during periods of training, *id.* § 21.40-43; and special loan guarantees for purchases of homes and land, *id.* § 36.4203.

Veterans' preferences have been upheld in a long line of cases involving constitutional issues, including equal protection.[45] This Court recently upheld against an equal protection challenge a Massachusetts statute that gives veterans a permanent and absolute civil service employment preference. *Massachusetts v. Feeney*, 442 U.S. 256 (1979). The critical constitutional issue that the Court faced in that case was whether the distinction drawn between veterans and non-veterans was a pretext for gender-based discrimination. *Id.* at 274-85. Implicit in such an analysis was the assumption that a veterans' preference *per se*, and even such a substantial one, would plainly be constitutional. If the legislature is justified in extending preferred status to veterans, then it is surely justified in imposing restrictions on other groups, such as those found in the tax code, that only indirectly inure to the benefit of veterans.[46]

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[44] *Id.* at 261.

[45] *See, e.g.*, White v. Gates, 253 F.2d 868 (D.C. Cir.), *cert. denied*, 356 U.S. 973 (1958); Frederick v. U.S., 507 F.2d 1264 (Ct. Cl. 1974). *See also* J.S. App. at 114a; J.S. at 19.

[46] Contrary to the assertion made by appellee and adopted by the Court of Appeals, this case does not involve the use of "First Amendment rights" as a form of "currency" to reward veterans. Taxation With Representation of Washington v. Regan, 676 F.2d

CONCLUSION

The *en banc* decision of the United States Court of Appeals for the District of Columbia Circuit should be reversed.

Respectfully submitted,

Of Counsel:
GEORGE H. GANGWERE
LAWRENCE M. MAHER
SWANSON, MIDGLEY, GANGWERE, CLARKE & KITCHIN
1500 Commerce Bank Building
Kansas City, Missouri 64106
WILMER S. SCHANTZ, JR.
6736 Old McLean Village Drive
McLean, Virginia 22101

SHELDON S. COHEN
Counsel of Record
JULIE NOEL GILBERT
DENNIS B. DRAPKIN
COHEN & URETZ
Suite 400
1775 K Street, N.W.
Washington, D.C. 20006
Telephone: (202) 835-7300
Counsel for the Veterans of Foreign Wars of the United States

December 16, 1982

715, 740 (D.C. Cir. 1982), *appeal docketed* 51 U.S.L.W. 3001 (U.S. July 6, 1982) (No. 81-2338). As the development of the exempt organization provisions demonstrates, *supra* 18-27, the lobbying provisions reflect Congressional concern with problems that are not present in the case of veterans' groups, rather than an effort to "favor one speaker over another," *Id.*

NO. 81-2338-AFX	TITLE Donald T. REGAN, Secretary of the Treausry, et al., Appellants, v. Taxation with Representation of Washington

DOCKETED	COURT
June 22, 1982	United States Court of Appeals for the District of Columbia Circuit

DATE	PROCEEDINGS AND ORDERS
	Counsel for appellants: Solicitor General
	Counsel for appellee:
June 4, 1982	Motion of Disabled American Veterans and Paralyzed Veterans of America to intervene as party appellant filed, and DENIED by Order of the Court, 6/21/82.
June 11, 1982	Motion of American Legion to intervene as party appellee filed, and DENIED by Order of the Court, 6/21/82.
June 11, 1982	Motion of Veterans of Foreign Wars of the United States to intervene filed, and DENIED by Order of the Court, 6/21/82.
June 22, 1982	Statement as to jurisdiction filed. (Record filed).
July 22, 1982	Brief, amicus curiae, of the Veterans of Foreign Wars of the United States filed.
July 23, 1982	Brief, amici curiae, of Disabled American Veterans, et al. filed.
July 23, 1982	Brief, amicus curiae, of The American Legion filed.
July 23, 1982	Memorandum of appellee filed.
Sept. 7, 1982	DISTRIBUTED. SL25P1.
Oct. 4, 1982	Probable jurisdiction NOTED.

Nov. 22, 1982	Order extending time to file the joint appendix and Government's brief on the merits until Dec. 9, 1982.
Dec. 6, 1982	Order further extending time for the Government's joint appendix and brief on the merits until Dec. 16, 1982.
Dec. 14, 1982	Joint appendix filed.
Dec. 16, 1982	Brief, amicus curiae, of The American Legion filed.
Dec. 16, 1982	Brief, amicus curiae, of the Disabled American Veterans & Paralyzed Veterans of America filed.
Dec. 16, 1982	Brief, amicus curiae, of the Veterans of Foreign Wars of the U.S. filed.
Dec. 20, 1982	Brief of the appellants filed.
Dec. 23, 1982	Motion of Disabled American Veterans, et al. for leave to participate in oral argument as amici curiae and for divided argument and for additional time for argument filed. (Over).

81-2338

Title

No.

DATE	PROCEEDINGS AND ORDERS
Dec. 30, 1982	Motion of American Legion, et al. for leave to participate in oral argument as amici curiae, for divided argument and for additional time for argument filed.
Jan. 17, 1983	The motion of Disabled American Veterans, et al. for leave to participate in oral argument as amici curiae, for divided argument and for additional time for argument is DENIED. The motion of American Legion, et al. for leave to participate in oral argument as amici curiae, for divided argument and for additional time for argument is DENIED.
Jan. 14, 1983	Order extending time to file the appellee's brief on the merits until Feb. 11, 1983.
Feb. 15, 1983	CIRCULATED.
Feb. 11, 1983	Brief, amici curiae of American Assocation of Museums, et al. filed.
Feb. 11, 1983	Brief of appellee filed.
March 15, 1983	Reply brief for the appellants filed. (D).
March 22, 1983	ARGUED.